

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

*Original w/ Affidavit of
Mailing*

74-2328 et al.

To be argued by
RONALD E. DE PETRIS

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket Nos. 74-2328, 2329, 2462, 2463, 2464

UNITED STATES OF AMERICA,

Appellee,

—against—

HARRY BERNSTEIN, ROSE BERNSTEIN, EASTERN
SERVICE CORPORATION, FLORENCE BEHAR
and MELVIN CARDONA,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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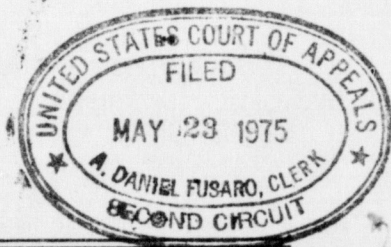




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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 74-2328, 2329, 2462, 2463, 2464

UNITED STATES OF AMERICA,

Appellee,

—against—

HARRY BERNSTEIN, ROSE BERNSTEIN, EASTERN SERVICE
CORPORATION, FLORENCE BEHAR and MELVIN CARDONA,
Defendants-Appellants.

BRIEF FOR THE APPELLEE

Preliminary Statement

Appellants Harry Bernstein, Rose Bernstein, Eastern Service Corporation, Florence Behar, and Melvin Cardona appeal from judgments of conviction of the United States District Court for the Eastern District of New York (Anthony J. Travia, *J.*) entered on October 4, 1974, after a jury trial, which judgments convicted all appellants of conspiracy in violation of 18 U.S.C. § 371, all appellants except Cardona of substantive bribery offenses in violation of 18 U.S.C. § 201, and all appellants except Rose Bernstein of substantive false statement offenses in violation of 18 U.S.C. § 1010.

On March 29, 1972 a federal grand jury sitting in the Eastern District of New York handed up twelve indictments naming forty individuals and ten corporations in approxi-

mately 500 counts of conspiracy, bribery, and making false statements in connection with applications for mortgage insurance on real estate, which applications were submitted to the Federal Housing Administration of the Department of Housing and Urban Development [hereinafter "FHA"]. On May 22, 1972 the same federal grand jury superseded the original indictments by thirteen indictments (72 CR 587 - 72 CR 599 inclusive) containing approximately 800 counts. The charges brought against all of the defendants remained essentially the same in the two series of indictments, the only difference being as to matters of legal form.

The instant indictment (72 CR 587) was one of these thirteen superseding indictments.* It named 21 individuals and two corporations as defendants. It consisted of 211 counts alleging violations of 18 U.S.C. § 371 (conspiracy), 18 U.S.C. § 201 (bribery), and 18 U.S.C. § 1010 (false statements and overvaluation) in connection with applications for mortgage insurance submitted to the FHA. After various pre-trial procedures were completed, trial of the indictment was set to commence on October 1, 1973.

On that date the government consented to motions for severance by six of the defendants. In addition, six defendants had previously reached a disposition of their cases through pleas of guilty to various charges, and they were severed from the indictment. Further, one defendant who was deceased was also now formally severed. Then on October 2, 1973 another defendant pled nolo contendere to the entire indictment. This reduced to nine the number of defendants who proceeded to trial in the instant matter. Further, as a result of a motion by the government to sever various

* Appellants Harry Bernstein, Rose Bernstein, and Eastern Service Corporation were named as defendants in all thirteen indictments. Appellant Florence Behar was named as a defendant in the instant indictment and one other one. Appellant Melvin Cardona was named as a defendant only in the instant indictment.

counts, and a direction by the court in response to motions by the defendants to limit the number of counts, the number of counts on which the government would proceed to trial was reduced to 65.

The indictment was thus pared for trial from 211 counts to 65 counts and from 23 defendants to 9 defendants. There remained for trial in the redacted indictment 1 conspiracy count, 29 false statement counts, 22 bribe-paying counts, 2 bribe-receiving counts, and 11 overvaluation counts.* The trial itself commenced on October 15, 1973 with the selection of the jury. The government presented its first witness on October 29, 1973, and rested its direct case on March 21, 1974. The defendants presented their case during the period from April 16, 1974 to May 15, 1974. On that date rebuttal evidence was introduced and both sides rested their cases. Summations lasted from May 20, 1974 until June 12, 1974. The court charged the jury on June 13, 14 and 17, 1974. The jury commenced its deliberations on June 17, 1974 and concluded on July 5, 1974.

On June 25, 1974 the jury rendered its verdict as to the five appellants herein. Appellant Harry Bernstein was convicted of conspiracy, 16 counts of bribery, and one count of submitting false statements to the FHA. He was acquitted on 3 bribery counts. Appellant Rose Bernstein was convicted of conspiracy and four counts of bribery. She was acquitted on 3 bribery counts.** Appellant Eastern Service

* For the convenience of the Court, there is attached hereto in the addendum to this brief Schedule A, setting forth the defendants charged, the statutory section alleged to have been violated, and the verdict as to each count of the redacted indictment.

** Four false statement counts and one bribery count against Rose Bernstein had been dismissed by the court on consent at the end of the government's case. Three false statement counts against Harry Bernstein had been dismissed by the court on consent at the end of the entire case.

Corporation was convicted of conspiracy, 18 counts of bribery, and 18 counts of submitting false statements to the FHA. It was acquitted on 3 bribery counts. Appellant Behar was convicted of conspiracy, 3 counts of bribery, and 18 counts of submitting false statements to the FHA. She was acquitted on 1 bribery count. Appellant Cardona was convicted of conspiracy and 17 counts of submitting false statements to the FHA.*

On October 4, 1974 the court sentenced the five appellants herein.** Appellant Harry Bernstein was sentenced to a term of imprisonment of five years on the conspiracy count, five years on each of the 16 bribery counts, and two years on the false statement count, the terms to run concurrently. He was also fined \$10,000 on the conspiracy count, \$10,000 on each of the 16 bribery counts, and \$5,000 on the false statement count, all fines to run consecutively (making a total fine of \$175,000). Appellant Rose Bernstein was sentenced to a term of imprisonment of four years on each count to run concurrently, and a fine of \$10,000 on the conspiracy count and \$10,000 on each of the four bribery counts to run consecutively (making a total fine of \$50,000). Appellant Eastern Service Corporation was fined \$10,000

* The jury was unable to reach a unanimous verdict with respect to the defendants Dun & Bradstreet, Inc. (conspiracy and 10 false statement counts), Arthur Prescott (conspiracy and 10 false statement counts), and Herbert Cronin (conspiracy and 11 overvaluation counts). One false statement count had been dismissed on consent against the defendants Dun & Bradstreet, Inc. and Prescott at the end of the government's case. The jury acquitted the defendant Joseph Jankowitz (conspiracy and 2 bribery counts). The jury was discharged by the Court on July 5, 1974. Thereafter, by order dated November 25, 1974, the court granted motions by the defendants Dun & Bradstreet, Inc. and Prescott for a judgment of acquittal on the conspiracy and 10 false statement counts as to which there was a hung jury.

** For the convenience of the Court, there is attached hereto in the addendum to this brief Schedule B, setting forth as to each appellant herein the verdict and sentence on the counts in which each was charged.

on the conspiracy count, \$5,000 on each of the 18 false statement counts, and \$20,000 on each of the 18 bribery counts, all fines to run consecutively (making a total fine of \$460,000). Appellant Behar was sentenced to a term of imprisonment of two years on each count to run concurrently and a fine of \$1,000 on each of the 3 bribery and 18 false statement counts to run consecutively (making a total fine of \$21,000). Appellant Cardona was sentenced to a term of imprisonment of two years on each count to run concurrently and a fine of \$1,000 on each of the 17 false statement counts to run consecutively (making a total fine of \$17,000). Execution of sentence was stayed, and appellants are free on bail pending this appeal.

On this appeal appellants raise a variety of issues. These involve (1) issues relating to the form and sufficiency of the indictment; (2) issues relating to the fairness of the trial (single conspiracy-joinder and severance, prosecutorial mismanagement, and conduct of the trial judge); (3) issues relating to the evidence (sufficiency of the evidence, and evidentiary rulings); (4) issues relating to the court's charge to the jury (element of knowledge, aiding and abetting, and failure to marshal the evidence); and (5) miscellaneous procedural issues (whether there were multiple convictions on certain of the bribery charges, whether appellant Behar was deprived of the right to counsel of her own choice, and whether the district court erred in refusing to disqualify itself prior to trial).

Statement of Facts

The proof at trial, as developed in some 25,000 pages of trial transcript, showed an extensive and wide-ranging scheme to thwart the lawful operation of the loan guaranty program of the Federal Housing Administration (hereinafter "FHA"). The scheme involved bribery of FHA officials and submission to the FHA of applications for mortgage insurance

containing false statements.* The government's case against the appellants herein rested primarily on the testimony of five persons intimately connected with the criminal scheme (Ortrud Kapraki, Jose Abad, Frank Fey, Edward Goodwin, and Rose Cohen), corroborated to a large extent by each other and by various documentary evidence.**

1. The setting

a. The Federal Housing Administration

The setting of the trial was in the world of real estate transactions involving home mortgages insured by the FHA. The FHA is a part of the Department of Housing and Urban Development, an agency of the United States Government. The purpose of the FHA is to help make mortgages available to people in lower and middle income groups who might not be able to obtain conventional bank financing. The FHA gives an incentive to a lending institution to make loans in this situation, by granting mortgage insurance to the lender-mortgagee insuring it against loss if the mortgagor is unable to pay off the loan. The FHA will only do business with and grant insurance to approved mortgagees, that is, lending institutions which meet certain requirements and which have been approved by the FHA. (R. 2207-2214.)***

* For the convenience of the Court, there is attached hereto in the addendum to this brief Schedule C—an outline of the trial record, setting forth chronologically the various events at trial (including each witness who testified), the dates on which the event took place, and the page of the record on which the event commenced.

** For a thorough discussion of this corroboration, see the government's summation (R. 20229-21101), which pulls the various pieces of evidence together and thus constitutes an excellent place to start in attempting to understand and obtain an overall picture of this trial record.

*** References to the trial transcript are preceded by "R." References to the appendix are preceded by "A." (volumes I and II), "B." (volumes III and IV), "C." (volumes V and VI), or "D." (volume VII).

In order to fully understand how the criminal scheme worked, it is first necessary to set forth in some detail exactly how the FHA loan guaranty program functioned. The FHA regional insuring office involved in this trial, located at 175 Fulton Avenue, Hempstead, New York, had jurisdiction to issue mortgage insurance on one to four family houses (R. 2230-2231, 11718). To obtain mortgage insurance from this office, an approved mortgagee was required to submit an application. The procedure involves two steps. The first is an application for an appraisal of the property, which is made on a "Form 2800" (C. 1128). The approved mortgagee submits this form to the FHA, containing information relating to the physical description of the property. The application goes to the receiving unit, which assigns a case number to the application and opens a file on it. Then the file goes to an administrative clerk in the appraisal section. This assignment clerk checks the application to see which geographic area the property is located in, and assigns the case on a random basis to one of the appraisers who work in that geographic area. (R. 2222-2226, 11741-11745, 11759, 14240-14244.)

When the FHA appraiser receives the case, he calls the person designated in the application, either a real estate broker or the approved mortgagee, to make an appointment for conducting his appraisal. On the appointed day the appraiser goes to the property and examines the premises. After making his appraisal, the appraiser places certain information on the form 2800. Most importantly, he determines whether the property is acceptable to the FHA, and, if so, what its FHA value is. He then returns the file to the FHA. If the property is acceptable, a "conditional commitment" is issued to the approved mortgagee, indicating that the FHA will insure a mortgage on that property not in excess of a specified amount on certain conditions.* The

* According to FHA requirements, the amount of the insured mortgage varied roughly between 90% and 97% of the FHA value (R. 2227-2229).

principal condition is that within six months the approved mortgagee submit an application for credit approval on a mortgagor having a satisfactory credit standing. If the value placed on the property by the FHA is deemed to be too low, the approved mortgagee may submit a request for a revaluation of the property by the FHA. (R. 2226-2227, 11701-11703, 11745-11746, 11760-11804; form 2800 at C. 1128.)

The second step in the process is the mortgagee's application for approval of the mortgagor's credit, which is made on a "Form 2900" (C. 1129). The approved mortgagee is required to submit this application for mortgage insurance containing information relating to the mortgagor's credit, including his age, marital status, employment, length of employment, monthly income, monthly expenses, and liabilities. The approved mortgagee is also required to submit certain exhibits as part of this application, including a credit report, verification of employment form to be completed by the employer, verification of bank deposits to be completed by a banking institution, and a currently dated balance sheet and operating statement if the mortgagor's principal income is from his own business. The mortgagor and the mortgagee are required to certify that all information in the application is true and complete to the best of their knowledge and belief. The application is then assigned to an FHA credit examiner. If the mortgagor's credit is satisfactory and approved, the FHA issues a "firm commitment" to the approved mortgagee, indicating that the FHA will insure a mortgage on the particular property in the amount specified provided that this particular mortgagor is the owner-occupant and the approved mortgagee submits the note and mortgage to the FHA within 60 days. (Form 2900 at C. 1129; R. 2345-2346, 2358-2377, 2391-2493.)

b. The participants—Eastern Service Corporation, Harry Bernstein, Rose Bernstein, Florence Behar, Melvin Cardona and Frank Fey.

Appellant Eastern Service Corporation, located in Hempstead in the same building as the FHA office, was one of the approved mortgagees which submitted applications to this FHA office (R. 2217-2220, 10672-674). Eastern Service Corporation, concededly one of the major lending institutions on Long Island, functioned as an interim lender. It initially loaned money to purchasers of the homes. Then, after the loans were processed and closed, the corporation sold the loans to various permanent lenders, including savings banks, pension funds, and the Federal National Mortgage Association. After the loan was sold to a permanent lender, Eastern Service Corporation was usually retained by the permanent lender to perform the administrative tasks involved in servicing the mortgage. Thus there were two major departments in the structure of Eastern Service Corporation—the loan origination department and the servicing department. The origination department was broken down into various sections. These included the mortgage solicitors, whose function was to solicit business from and work with the real estate brokers and speculators who were selling the houses on which mortgage insurance was sought from the FHA; the processing section responsible for processing the applications for submission to the FHA; the closing section; and the sales section responsible for selling the loans to the permanent lenders after the closing. (R. 10631-10636, 10661-10666, 11109-11114, 11125-11126.)

Appellant Harry Bernstein was the president and sole stockholder of Eastern Service Corporation (R. 10666, 16492-16494). Appellant Rose Bernstein, the wife of Harry Bernstein, had her own business as a mortgage broker, preparing FHA applications for real estate brokers and speculators and filing them with the FHA through Eastern Service Cor-

poration. Although she was not an officer or employee of Eastern Service Corporation, she was, as will be seen later, intimately involved in its affairs and operations with respect to the submission of applications to the FHA (R. 10670-676). Appellant Florence Behar was in charge of the processing section at Eastern Service Corporation. There were approximately 15 employees working under her supervision. As assistant vice president, it was her responsibility to sign the mortgagee's certificate on behalf of the corporation (R. 10628-10630, 10681-683, 6060). Appellant Melvin Cardona was one of approximately 12 to 14 mortgage solicitors employed by Eastern Service Corporation (R. 10680-10681). The co-conspirator Frank Fey was a vice president of Eastern Service Corporation in charge of the loan origination department (R. 10628, 10661).^{*} He reported directly to Harry Bernstein on a daily basis, and implemented the policies of the corporation established by Bernstein. Among his duties was the sale of mortgages to permanent lenders after the closings. (R. 10666-10669, 10631).

The corporation made a profit from two major sources: the origination and sale of loans (loan origination income), and the servicing of loans (servicing income). On each loan which closed, the corporation charged an origination or processing fee of one "point" (one percent of the mortgage amount). This basically covered the cost of processing the application. In addition, the corporation charged a certain number of "points" to the real estate broker or speculator. After the loan closed, it would then be sold to a permanent lender at a discount of a certain number of "points." The difference between the points charged to

^{*} Fey testified as a witness for the government. At that time he had pled guilty to a superseding information charging a conspiracy to violate 18 U.S.C. § 1012. He had been sentenced to a term of imprisonment of one year and a fine of \$10,000, had served six months of that term and was then paroled, and had paid the fine (R. 10577-10601).

the speculator and the points at which the loan was discounted to the permanent lender represented the profit, at least the gross profit, to Eastern Service Corporation on the particular transaction (eg: if on a \$20,000 mortgage, the corporation charged the speculator eight points and sold the loan to a permanent lender at a discount of five points, the difference of three points represented a profit of \$600 to the corporation). Additionally, if the corporation serviced the loan for the permanent lender, a further profit could be made on the transaction. (R. 10664, 10706-10709, 10720, 11062-11063, 11110-11114, 11199-11200, 11553, 16182-16188, 16494-16498, 16512, 16527-16530, 16548-16567).

c. The other participants—Herbert Cronin, Joseph Jankowitz, Edward Goodwin, Rose Cohen, Jet Warehouse, Inc., Ortrud Kapraki, Dun & Bradstreet, Inc., and Arthur Prescott.

The defendant Herbert Cronin was the Chief Underwriter of the FHA office involved herein. He was the functional head of the office, in charge of its day to day operation and responsible for overseeing both the appraisal and the credit sections of the office. The chief of both the appraisal and credit sections reported directly to Cronin, who had the power to review and override virtually any decision in the office. This included decisions as to the acceptance or rejection of a particular property, the FHA value placed on a particular property, and the acceptance or rejection of a credit application on a particular mortgagor. He also had the power known as the "chief underwriters prerogative" (hereinafter "CUP"). By the exercise of the CUP the FHA value may be increased up to a maximum of \$500 on a particular property. The use of the CUP was within the discretion of the chief underwriter, subject to the requirements of the applicable regulation. (R. 11728-11729, 14737-14744).

The defendant Joseph Jankowitz was a senior FHA staff appraiser, who did appraisals in Brooklyn and who also reviewed appraisals performed by others in Brooklyn. The coconspirator Edward Goodwin was an FHA staff appraiser, who performed and reviewed appraisals in Brooklyn.* (R. 11691, 11776-11782, 11958-11959.) As with other appraisers in the office who worked in Brooklyn, these men set the FHA value on the property, which in effect determined the sales price of the properties involved in this trial. These properties were located in low income, declining areas of Brooklyn—a speculator-dominated market. In these areas, the mortgagors only had a small amount of money for a down payment on a house. Therefore, as a practical matter, the value set by the FHA appraiser determined the sales price at which the mortgagor would purchase the property. (R. 11698-11700, 11768-11769, 14753-14756, 17857-17859, 17876-17879, 17932-17933, 17939-17940).

The coconspirator Rose Cohen was employed by the FHA as an assignment clerk in the appraisal section.** As such, it was her duty to assign the applications which came into the office on a random basis to an appraiser for the making of the FHA appraisal on the property (R. 14238-14244).

There were a number of real estate speculators who were active in the area of Brooklyn involved in this trial. One of these was Jet Warehouse, Inc. (hereinafter "Jet"), a corporation wholly owned by Harry Bernstein. Jet had been active in connection with conventional financing of sales of real property in these areas prior to the time when the FHA began to insure mortgages therein; it held second

* Goodwin testified as a witness for the government. At that time he had pled guilty to the conspiracy count of this indictment and was awaiting sentence (R. 11667-11666, 11714).

** Cohen testified as a witness for the government. At that time she had pled guilty to the conspiracy count of the indictment and was awaiting sentence (R. 14234-14237).

mortgages on a number of properties which were later refinanced via FHA insured mortgages. It also loaned money to various real estate speculators to purchase properties in these areas, on which applications would then be submitted to the FHA (R. 10722-10723, 15441-15454, 3782-3786).

The coconspirator Ortrud Kapraki was one of the real estate speculators active in this area.* She did a volume business during the period from the summer 1968 until the early part of 1970 (R. 3110, 10724). In this period she had approximately 200 closings at Eastern Service Corporation (R. 3111-3112). Since the corporation had approximately 2000-2500 closings a year (R. 10973), her account alone constituted approximately 5% of the business of Eastern Service Corporation in FHA insured mortgages.

As noted earlier, one of the exhibits required to be submitted by the approved mortgagee to the FHA as part of the application for mortgage insurance is a credit report. The credit reporting agency which Eastern Service Corporation utilized to provide these credit reports was the defendant Dun & Bradstreet, Inc. (hereinafter "D&B"). The defendant Arthur Prescott was the district manager of the D&B office located in Hicksville, New York. He was in charge of the operations of this office and was responsible for implementing the policy of the company with respect to the credit reports which it prepared for Eastern Service Corporation, and which in turn were submitted to the FHA (R. 7751-7753, 7771-7772, 8802, 8827, 10011-10012, 10816-10820, 17186-17188).

* Kapraki testified as a witness for the government. At that time she had pled guilty to the conspiracy count of the indictment and was awaiting sentence (R. 3015-3022).

d. The effect of FHA financing.

As in any business, the participants in the real estate business normally bear certain risks. For example, the real estate speculator who buys property with the hope of selling it at a profit normally bears the risk that he will not be able to find a purchaser with enough money to make a down payment and with sufficient credit standing to obtain a mortgage at a sales price profitable to the speculator (R. 3039-3040). The private lending institution, which hopes to make a profit in selling the mortgage to a permanent lender, normally bears the risk that it will not be able to find a permanent lender who will find the mortgage acceptable or one who will purchase it at a discount less than the number of points previously charged by the lending institution to the speculator. Even after the loan is sold, to a permanent lender, the interim lender also normally bears a risk, for normally the interim lender is obligated under a so-called "buy-back" agreement to repurchase the loan from the permanent lender if the mortgage becomes delinquent and goes into foreclosure. Under those circumstances it will very likely have to absorb a loss when the foreclosure proceedings are complete (R. 10930-10934, 11046, 11089-11100, 18385-18386, 18391).

The central economic fact of life in the setting involved herein is that the risks normally born by these participants in real estate transactions are either reduced or virtually eliminated by the issuance of FHA insurance to approved mortgagees. The risk that a real estate speculator would not be able to find a purchaser with sufficient money to cover the down payment is reduced by virtue of the fact that the FHA required very low down payments (R. 2227-2229, 3045, 3309-3312). Further, the risk that the private lending institution normally bears is virtually eliminated. First, a permanent lender was far less hesitant to purchase a mortgage on a low income purchaser if it was insured (R. 11044). Second, if the mortgage goes into foreclosure and the interim lender has to buy it back from the permanent lender,

the interim lender knows that the FHA will pay virtually full value on the outstanding loan; the interim lender is not in a position of absorbing a potentially big loss on a foreclosure sale. Although there are some foreclosure expenses which are not covered by the FHA, even here the interim lender may make a profit or loss on the transaction, depending on the amount of money it initially received from the real estate speculator in the form of "points". Moreover, many of the mortgages on inner city properties were sold to the Federal National Mortgage Association (hereinafter "FNMA").* As to these mortgages, there were no repurchase agreements; hence FNMA, not the interim lender, bore the cost of the foreclosure expenses (R. 2213, 2344-2345, 11046-11047, 11175-11187, 11438-11459, 11580-11594, 11608-11610, 18702-18705). As one of the FHA experts testified at trial, the approved mortgagee is giving an FHA insured mortgage to the mortgagor with "risk zero" (R. 15248).

The aforementioned discussion as to risks reveals that the status of an interim lender as an approved mortgagee gives it an economic advantage over lenders which are not so approved. Eastern Service Corporation made substantial profits with very little risk because of its relationship with the FHA as an approved mortgagee. In return, certain obligations are placed on the approved mortgagee. Since the FHA does not have the staff or the time to verify the information on each application, and does not have the benefit of a personal interview with the mortgagor, it must rely heavily on the accuracy and completeness of the information submitted by the mortgagee. The approved mortgagee has the obligation to submit accurate and complete credit information. It has the obligation to obtain verification of employment and income, to obtain a credit re-

* 75% of the mortgages on Kapraki's properties were sold to FNMA (R. 11458).

port, and to obtain financial statements verifying a mortgagor's self-employment and income therefrom. The approved mortgagee should also exercise good business judgment. It is not just a paper pusher. It must evaluate the credit risk, just as the FHA does. In short, the policy underlying the FHA program is one of reliance by the FHA on the approved mortgagee. (C. 1129; D. 11, 13-15; R. 2222, 2477-2478, 2483, 2548, 2551, 2585-2586.)

2. Bribery of FHA officials

a. Development of the bribery scheme, and bribery of Goodwin on the so-called Jet (Bernstein) properties.

In March 1967, the FHA was in the midst of a change in policy. Under the new policy the FHA would consider insuring mortgages in inner city areas where there had previously not been any appreciable FHA financing. The FHA policy began to change at the time of the riots in 1966, and culminated in a speech by Assistant Secretary Brownstein in October 1967. Thus a whole new market was opening up—a whole new field for making money (R. 14941-14949, 15146-15155, 15320).

Jet, wholly owned by Harry Bernstein, held second mortgages on, as well as owned, a number of properties in the inner city areas of Brooklyn (R. 15441-15454). Bernstein, a smart businessman who kept abreast of changes in FHA policy (R. 18353), saw an opportunity to make large profits in a new market. Profits depend on how high or low the FHA values are set on the properties. Obviously, the higher the FHA value on a property, the more money Jet would receive if the property was refinanced or sold through an FHA insured mortgage, and the more likely the transaction would be to proceed to a closing with an FHA insured mortgage issued by Eastern Service Corpora-

tion.* FHA appraisers set these values. Especially in a new market where values are not well-established, the making of an appraisal is a subjective type of analysis—an opinion based on facts. Moreover, the selection of comparable properties is very important in setting values, and an appraiser selects his own comparables. (R. 11698-11700, 11768-11769, 11784, 11809-11814, 11844, 14753-14756, 15137-15142). In effect then, Harry Bernstein realized that values in a new market would to a certain extent be whatever the appraiser says they are.

In December 1966, at a Christmas party, Harry and Rose Bernstein approached Edward Goodwin.** Bernstein suggested that they get together for a talk, as there was a lot of money to be made (R. 11851-11855). Thereafter in March 1967 Bernstein invited Goodwin to come up to his office, ostensibly to pick up keys for some houses (R. 11858-860). However, it was contrary to FHA policy for an appraiser to go to the office of an approved mortgagee to pick up keys for houses (R. 11796-11802). Goodwin told this to Bernstein. A few minutes later Goodwin was called to the office of the chief underwriter, Herbert Cronin. Cronin told Goodwin that it was "OK" for him to pick up the keys at Bernstein's office. Consequently, at the end of the day, Goodwin did go up to Bernstein's office. Goodwin was shown around the office, and then had a conversation with Harry and Rose Bernstein. Bernstein opened the conversation by saying, "I hear you're going into Brooklyn."*** Bernstein told Goodwin

* For a discussion of the profit motive on these Jet properties, see R. 20349-20355. See also the discussion in Point V, *infra*.

** Bernstein knew Goodwin as a result of Goodwin having done some appraisals for him before Goodwin began to work with the FHA. Further, Bernstein had previously done Goodwin a favor, writing a letter of recommendation for Goodwin when he applied for employment with the FHA (R. 11671-11673, 11676-11687). The logical choice of an appraiser for Bernstein to initiate a bribery relationship with was Goodwin (R. 20360-20362).

*** Prior to this time Goodwin had been assigned to appraise houses in all areas, but mostly in Suffolk County. About a week before this conversation, Cronin had told Goodwin that he was going to start assigning him to Brooklyn (R. 11956-11959).

that Goodwin would be getting some of Bernstein's cases—houses which Bernstein was interested in, and that he needed “top dollar” on the houses. Bernstein told Goodwin that on any of these cases he would pay Goodwin \$50 per property. Goodwin said that that was not necessary. The conversation concluded, with Harry and Rose Bernstein endeavoring to encourage Goodwin to accept this arrangement. The following Monday, Cronin asked Goodwin how he made out on the business of the “keys”; Goodwin replied that there was no problem. (R. 11860-865, 11960-11979.)

After that first meeting in March 1967, Goodwin began making his appointments on the applications submitted by Eastern Service Corporation with Harry Bernstein. He also began making periodic visits to Bernstein's office to report on the values that he had given to the properties, and to get paid by Bernstein. The first such visit took place at the end of April 1967. Bernstein and Goodwin went over the list of houses which Goodwin had appraised on applications submitted by Eastern Service Corporation. Goodwin said that he was not always able to tell which houses were Bernstein's. Bernstein told Goodwin that when Goodwin called to make an appointment, Bernstein would identify the houses which were his by saying “ORE”, meaning “our real estate”. It was on these properties that Goodwin could expect to receive the payment of \$50 per property. There were four such properties on the list of houses which Goodwin had recently appraised. When Bernstein indicated he would pay Goodwin \$200 for these four properties, Goodwin said that that was not necessary. Rose Bernstein encouraged Goodwin to accept the money. Harry Bernstein then handed Goodwin the money.* (R. 11979-11980, 11983-11986, 12040-12051.)

* The money totalled \$300; \$50 each for the four properties, and \$100 as a wedding present (R. 12049-12050, 12052).

Goodwin met Harry and Rose Bernstein again in June, August, and September 1967 in the office of Eastern Service Corporation. On each occasion Harry Bernstein paid him a sum of money for properties which he had appraised (R. 12054-12057, 12062-12064, 12090, 12093-12115, 12141).

Paying Goodwin in connection with initial appraisals was only half of Bernstein's plan for inflating values and maximizing profits. The other half of the plan involved obtaining a revaluation by Goodwin and the use of the CUP by Cronin. To accomplish this, after Eastern Service Corporation submitted a request for a revaluation, Cronin would personally return those files to Goodwin and ask Goodwin to take another look at the value. Cronin used words to the following effect: "Is that all it's worth? Take another look." Goodwin interpreted these words as being an implied direction to raise the value (see, e.g., R. 12157-160, 12631-635, 13696-697, 13724-728). Goodwin would then take the file to his desk, increase the value without any valid reason, and then return the file to Cronin's office. Instead of disallowing Goodwin's increase on the ground that no valid reason had been given for the increase, Cronin would then exercise the CUP, increasing the value up to \$500 more (see transcript references in schedule *infra* at pp. 20-21.) *

Bernstein and Goodwin continued to follow the same pattern from that time in 1967 through 1971. Goodwin would call Bernstein to make appointments for appraisals. Bernstein would indicate which houses he had an interest in, meaning Goodwin could expect to receive \$50 on the property. Goodwin would appraise the various houses, and set an FHA value on the property. Periodically he would visit

* The testimony of Milton Francis, an FHA expert witness, established that Cronin was improperly using the CUP (see, e.g., R. 14727-14918). The chart introduced through the witness Martin Hardiman established a pattern with respect to Cronin's use of the CUP. Of the various approved mortgagees, Cronin was using the CUP almost exclusively for Eastern Service Corporation (R. 14563-14629). There was also circumstantial evidence in this regard based on conversations between Bernstein and Goodwin (see, e.g., R. 12156, 12208, 12237, 12526, 12533, 12545, 12630, 12643-12644).

Harry Bernstein in his office at Eastern Service Corporation, at which time he would read over his log of properties appraised while Harry Bernstein went over his list of houses on a yellow pad. On each occasion Bernstein would pay Goodwin \$50 for each of the properties in which he had a financial interest. On several of these occasions Rose Bernstein was present. On many of these properties Bernstein sought a revaluation by Goodwin and the use of the CUP by Cronin. The following schedule illustrates the result of this bribery relationship on the properties involved in the counts of the redacted indictment in which Harry Bernstein, Eastern Service Corporation, and Cronin were charged as defendants:*

Overvaluation:

<i>10/6/67 Payments</i>	<i>Initial Appraisal</i>	<i>Revaluation</i>	<i>CUP</i>	<i>Transcript</i>
Counts 39-40 (190 Adelphi St.)	not overvalued	\$1000	\$500	R. 12144-12170, 12281.
Count 41 (185 Sackman St.)	\$1500 (house also should have been rejected)	no reval.	\$450	R. 12170-12193, 12281.
Counts 42-43 (356 Van Siclen Ave.)	not overvalued	\$1000	\$500	R. 12194, 12201- 12214, 12281.
Counts 44-45 (312 Milford St.)	\$500	\$500	\$500	R. 12214, 12230- 12243, 12281.
Counts 46-47 (340 Van Siclen Ave.)	\$1000	no reval.	\$500	R. 12243-12244, 12253-12268, 12281.
<i>10/20/67 Payments</i>				
Counts 48-49 (616 Schenck Ave.)	not overvalued	\$2500	\$500	R. 12361-12335, 12409, 12449- 12451.
Count 50 (468 Miller Ave.)	\$500	\$500	\$500	R. 12387-12403, 12409, 12449- 12451, 12744.

* In addition to the meetings involved in the substantive counts, on several other occasions in the years 1968 through 1971 Goodwin periodically met with Harry Bernstein in the office at Eastern Service Corporation, and was paid a sum of money for appraisals he had performed (R. 12784-787, 12825-829, 12956-957, 12967-968, 12970, 12972, 13005-008, 13013-020).

Overvaluation:

	<i>Initial Appraisal</i>	<i>Revaluation</i>	<i>CUP</i>	<i>Transcript</i>
10/27/67 <i>Payments</i>				
Counts 51-52 (381 Douglas St.)	\$1000 (house also should have been rejected)	no reval.	\$500	R. 12456-12458, 12478-12485, 12501-12509, 12516, 12526.
Counts 53-54 (726 Snediker Ave.)	\$2000	no reval.	\$500	R. 12455-12477, 12509-12510, 12516, 12526.
11/10/67 <i>Payments</i>				
Counts 55-56 (328-1st St.)	\$1000	\$500	\$500	R. 12529-12537, 12546-12547.
12/14/67 <i>Payments</i>				
Counts 57-58 (452 Miller Ave.)	\$1000	\$1000	\$500	R. 12625, 12638- 12649, 12659- 12661, 12686.
Counts 59-60 (454 Miller Ave.)	\$1000	\$800	\$500	R. 12625-12638, 12643, 12659- 12661, 12686.
2/15/68 <i>Payments</i>				
Count 61* (617 Vermont St.)	\$1500	no reval.	not used	R. 12688-12690, 12698-12706, 12714.
7/19/68** <i>Payments</i>				
Counts 63-64 (17 Wyona St.)	\$1000	no reval.	\$500	R. 12802-12803, 12818-12825.
6/18/70 <i>Payments</i>				
Count 65 (1034 Blake Ave.)	\$3000 (house also should have been rejected)	no reval.	\$500	R. 12974-12975, 12994-13002.

* The jury acquitted the defendants Harry Bernstein and Eastern Service Corporation on this count.

** Goodwin also testified that on this date Rose Bernstein told Harry Bernstein to pay Goodwin \$50 for the revaluation on 741 Sheffield Avenue (Count 62) (R. 12817-818). The jury acquitted Rose Bernstein on this count (her husband was not charged as a defendant).

The evidence showed that Jet Warehouse, Inc. held a second mortgage on nine of the properties involved in substantive counts referred to in the schedule (counts 39, 42, 46, 48, 50, 51, 53, 57, 59) and was the owner of three of these properties (counts 41, 55, 63) (R. 15441-15454). As to the other three properties, although Bernstein referred to them in various ways as his properties—"ORE", a "Jet", and "ORE" respectively (R. 12233, 12699, 12995), there was no direct evidence as to the exact nature of Bernstein's financial interest.

b. Bribery on the so-called Kapraki properties.

Eastern Service Corporation was in a very competitive business. There were approximately eight or nine substantial private lending institutions which were approved mortgagees submitting applications to the FHA, all operating in the same geographic area. They all had the same field of customers—the real estate speculators operating in that area. Further, they were all providing essentially the same service—the submission of applications for appraisals and mortgage insurance to the FHA. Moreover, success in the industry was dependent on volume of loan originations. (R. 11125-11128, 11201, 11062-11063, 18679-18705.)

Therefore, it was to the economic advantage of Eastern Service Corporation if it could develop an inducement to the real estate speculators to bring their business to Eastern Service Corporation. As will be seen below, Harry and Rose Bernstein did come up with such an inducement. Bernstein already had the services of Goodwin who, in return for bribes, inflated values on properties in which Jet Warehouse, Inc. owned the property or held a second mortgage on the property. Now the Bernsteins decided to make these services available to a real estate speculator like Ortrud Kapraki who was doing a volume business, thereby offering an inducement for such a speculator to

bring business to Eastern Service Corporation rather than to any of the other approved mortgagees. Obviously, this would be a valuable service to such a real estate speculator, because higher values means more profit to the speculator when the properties are sold.*

In the summer 1968, when Ortrud Kapraki began to submit an increased number of applications for appraisals to Eastern Service Corporation, Florence Behar told Kapraki that she should have the "right appraiser" on the properties. Kapraki agreed. Behar told Kapraki that she should meet the Bernsteins, because they were very influential in the business. At the end of the day, Behar introduced Kapraki to the Bernsteins (R. 3104-3107). Shortly thereafter, again observing that Kapraki was submitting many appraisal applications, Behar told Kapraki that it was very important to have staff appraisers examine her properties,** and that it was very important to pay them at the going rate of \$50 per property, in order to get a high value on the property. Behar again took Kapraki in to see Harry and Rose Bernstein. Behar told the Bernsteins that Kapraki was becoming a volume dealer, and needed staff men to appraise her houses. Harry Bernstein told Kapraki that she would have to take care of the appraisers. Kapraki agreed. Bernstein then said that they would take good care of her. Rose Bernstein urged Kapraki to bring her business to Eastern Service Corporation, telling her that "we" have the best

* The record is replete with conversations evidencing in particular Rose Bernstein's concern with providing a good service to Kapraki (R. 5117, 5182, 5190, 5198, 12849, 12864, 12877, 12901, 12923, 12927). Kapraki paid a lot of "points" to Eastern Service Corporation, but was willing to do this because she was getting "good service" (R. 12873-12875, 12912-12913a).

** A staff appraiser is employed on a full-time salary basis by the FHA. When the volume of appraisals exceeds the capacity of the staff appraisers, the appraisals are assigned to private real estate brokers who at that time were paid a fee of \$35 for each appraisal performed (R. 3108-3109).

connections in the industry. Rose Bernstein also told Kapraki that she would have to take care of the appraisers. (R. 3107-3111.) At that point in time Ortrud Kapraki joined an ongoing criminal conspiracy, the object of which was to bribe FHA officials.*

Thereafter this relationship developed into a certain practice or pattern of conduct. Whenever Kapraki had a particular problem with respect to a property (e.g.: she had spent a lot of money in buying the house, or in making repairs on the house) and needed to be sure that she would receive a high value on the property, Kapraki told Behar about the problem and requested that the "right appraiser" be sent out on the property. Behar would then either take Kapraki in to make this request directly to the Bernsteins, or would speak to Harry Bernstein about it herself. The two appraisers whom the Bernsteins arranged to have assigned to Kapraki's problem properties, and whom Kapraki requested of Behar and the Bernsteins, were Joseph Jankowitz and Edward Goodwin.** Then Rose Bernstein and Florence Behar would advise Kapraki that Jankowitz or Goodwin had been assigned to the case and would be at the property on a particular day. Rose Bernstein and Behar would also remind Kapraki to meet the appraiser and to pay him the money (\$100). Kapraki then met the appraiser, either "JJ" or "EG", and paid him \$100 per property.*** The following schedule illustrates this relationship on the substantive counts of the indictment: ****

* At this point in time bribery was the only object of the conspiracy to thwart the lawful operation of the FHA program. The development of the second object, the submission of applications containing false statements, will be discussed *infra* at p. 27.

** The Bernsteins and Behar, and subsequently Kapraki, generally referred to these men as "JJ" and "EG" respectively (R. 5016-5023).

*** Even on the properties where there was not a special problem and no need to request Jankowitz or Goodwin, Behar advised Kapraki to attempt to pay the appraiser. Following this advice, Kapraki made the attempt (R. 3587, 3879-3880, 4191-4192).

**** The method by which Harry and Rose Bernstein arranged for the right appraiser to be assigned is not illustrated by this schedule, and will be discussed next.

<i>Count</i>	<i>Request by Kapraki for "Right Appraiser"</i>	<i>Confirmation to Kapraki that "Right Appraiser" Assigned</i>	<i>Kapraki Bribe- Appraiser</i>	<i>Transcript</i>
Counts 29-30 (260-51st St.)	Behar, Harry and Rose Bernstein	Rose Bernstein, Behar	Jankowitz— \$100 (revalua- tion—October 29, 1968)	R. 5010-5082.
Counts 33-34* (211-53rd St.)	Behar, Harry and Rose Bernstein	Rose Bernstein, Behar	Jankowitz— \$100 (initial appraisal—Jan- uary 30, 1969)	R. 5072-5129
Count 35 (2503 Albemarle Rd.)	Behar, Harry and Rose Bernstein	Rose Bernstein, Behar	Goodwin— \$100 (recon- sideration ap- praisal after reject—April 2, 1969)	R. 5175-5233, 12839-12877.
Count 36 (371-12th St.)	Behar, Harry and Rose Bernstein	Rose Bernstein, Behar	Goodwin— \$100 (revalu- ation—July 25, 1969)	R. 5251-5280, 12919-12924.
Count 37 (570-55th St.)	Behar, Harry Bernstein	Rose Bernstein, Behar	Goodwin— \$100 (revalua- tion—July 14, 1969)	R. 5284-5308.
Count 38 (172-26th St.)	—	Rose Bernstein, Behar	Goodwin— \$100 (revalu- ation—July 26, 1969)	R. 5308-5345, 12924-12940.

As already noted, on these so-called problem properties Kapraki requested that the Bernsteins arrange for Jankowitz or Goodwin to be assigned to do the appraisals, and they were so assigned. There was both direct and circum-

* The jury acquitted all defendants in connection with the alleged bribery on counts 29-30 and 33-34.

stantial evidence establishing the methods by which the Bernsteins accomplished this.* On various occasions, Florence Behar went to Harry Bernstein's office and handed him some of Kapraki's appraisal applications, saying "here are the Kapraki applications." Later in the day Bernstein would return these applications to Behar, asking her to deliver them to the FHA (R. 10798-10803).** Rita Azzarella, Bernstein's secretary, also delivered documents to FHA employees, including among others Herbert Cronin, at the request of Rose Bernstein (R. 14143-14145). During the period of time involved herein Cronin would give appraisal applications submitted by Eastern Service Corporation (both initial appraisals and revaluations) directly to Goodwin, or to Rose Cohen with a direction to assign them to Goodwin or Jankowitz. This procedure was at variance with the regular procedure for assigning cases (R. 12754-12769, 14240-14258, 14275-14280). Further, from March 1969 through 1971 Cohen received bribes from Rose Bernstein in return for assigning cases to particular appraisers, especially Goodwin and Jankowitz (R. 14280-14313).***

* These arrangements for the assignment of a particular appraiser to a particular case also apply to the properties previously discussed in which Jet Warehouse, Inc. had a financial interest either as owner or second mortgagee. However, the matter is specifically discussed here in connection with the Kapraki properties, as it played a critical role in these defendants aiding and abetting Kapraki's payments of bribes.

** Since under normal or regular procedure there was no reason for Bernstein to see these appraisal applications at that time, the jury might properly infer that Bernstein did something with them in furtherance of his plan to arrange for the assignment of a particular appraiser (R. 20556-563). Indeed, Harry and Rose Bernstein often called Cronin to discuss appraisals (R. 10844-10874).

*** In light of her relationship with Goodwin, Cohen, Jankowitz, Cronin, and others in the FHA, small wonder that Rose Bernstein referred to herself as "Mr. FHA" (R. 10911).

3. Submission of applications containing false statements on the Kapraki properties

a. Kapraki's introduction to Eastern Service Corporation (Cardona and Behar) and the use of FHA financing.

In May 1967 Ortrud Kapraki opened an office at 4805 Fifth Avenue in the Bay Ridge section of Brooklyn.* She formed the 48th Street Realty Company, Inc. Kapraki had difficulties in obtaining conventional financing with respect to her initial activities as a real estate broker there, because the prospective purchasers did not have sufficient funds to cover the substantial down payments required in conventional mortgage financing (R. 3034-3041).

Then in the summer of 1967 Kapraki met Melvin Cardona in connection with one of her conventional real estate transactions. Kapraki told Cardona about the difficulties which she was having. Cardona, who worked on a commission basis as a mortgage solicitor for Eastern Service Corporation, then told Kapraki about Eastern Service Corporation and the FHA. He explained that only small down payments were required in FHA financing. He told Kapraki that Eastern Service Corporation was the first and the largest lending institution in the business, and that it accepted any kind of houses. He explained the procedures in applying for an FHA appraisal on a property, and encouraged her to do so through Eastern Service Corporation (R. 3041-3047, 6257).

* Prior to moving to Brooklyn, Kapraki operated as a real estate broker and speculator in the Ridgewood section of Queens. She had induced a number of people in that area to invest in second and third mortgages, on which she was a comaker. There came a time when the mortgages went into default and the houses were foreclosed. The holders of the second and third mortgages lost their substantial investments. Accordingly, Kapraki decided to move to a new area (R. 3026-3035, 5491-5510).

During the period from the summer 1967 until the spring 1968 Kapraki began making applications for FHA appraisals and mortgage insurance through Eastern Service Corporation. She worked with Cardona on those applications. Cardona explained the procedures involved in making a credit application to the FHA. He further told Kapraki that it was part of his duties to check on the prospective buyers as to whether they were qualified, and that the FHA relies on the truth of the information Eastern Service Corporation places in the credit applications. He stated that in order to qualify, the buyer's yearly income should be at least half of the mortgage amount. Despite Kapraki's efforts, as of March 1968, none of Kapraki's transactions had been approved by the FHA (R. 3047-3056, 3077-3088).

Kapraki complained about this to Cardona, who set up an appointment for her with Florence Behar to discuss a particular case. Kapraki went to Eastern Service Corporation with the three prospective co-buyers, and met with Behar. Behar told Kapraki that she had set up an appointment with the FHA for the purchasers, that she (Kapraki) should pose as a buyer herself in order to go in with them to the FHA, and that they should insist that they want and need the house badly. Although Kapraki followed this advice, the FHA credit examiner rejected the application. Very upset, Kapraki returned to tell Behar what had happened. Behar offered to "help Kapraki out" on her cases. Kapraki offered to pay Behar for the help. Behar agreed to accept \$50 or \$75 per case. Thereafter Behar went over several of Kapraki's pending applications, discovering that the applications were incomplete. Behar told Kapraki what other papers were required by the FHA. By June 1969 these six or eight applications had been approved by the FHA, and, after the closings, Kapraki paid Behar the \$50 or \$75 per case. (R. 3088-3102.) Behar also suggested to Kapraki that it would be a good idea to give the "processing girl" who worked on the particular case \$15 after the closing. Kapraki agreed (R. 3103). Thereafter in June or July 1968 Behar told Kapraki that one processing girl should handle all her

cases. Behar assigned Pat Buckley, an experienced processor, to handle all of Kapraki's transactions. Kapraki agreed with Buckley to pay her \$50 per case (R. 3113-3114).*

At this point in time, in the summer 1968, Kapraki was in an ideal position. She knew that Behar and Buckley would expedite the processing of her cases. Moreover, as noted earlier, she knew that she could get a high value on any particular property, because upon request Behar and the Bernsteins would arrange to have Goodwin or Jankowitz assigned to conduct the appraisal. Therefore, if she was only able to find buyers with sufficient income to be approved by the FHA, she saw an opportunity for big profits.

b. Development of the Cardona-Kapraki relationship in inflating the mortgagors' credit standing.

Cardona and Kapraki embarked on a program of finding the ways and means to falsely create at least the appearance of sufficient income on the FHA applications. The program as it developed was a gradual process, one step at a time, each step being devised to meet a specific problem that arose, each step involving that much more of a fraud.

Initially, when Kapraki's prospective purchasers did not have sufficient income to meet the FHA requirements, Cardona suggested that the purchasers ask a relative to act as a co-buyer. When the buyers had difficulty in finding a relative willing to act as a co-buyer, Cardona suggested that the purchasers find a friend who was willing to be a co-buyer and to sign an affidavit stating that they were cousins (R. 3085-3088). This too presented difficulties. Cardona then suggested that the purchasers get part-time jobs, working at night or on weekends. When Kapraki reminded Cardona that the FHA required verification of such employment for two years, Cardona said that if the employer liked the person working for him, he would verify that the purchaser

* Buckley was named as a defendant in the instant indictment. She pled nolo contendere to the indictment just prior to the trial (R. 167, 204).

had been working there for two years, even though this was not the case. Kapraki tried this, but her purchasers were generally unable to obtain second jobs. Cardona then suggested that the purchasers might know somebody, such as their local grocer, who would be willing to do them a favor and state that the purchasers work for him part time, even though they did not. However, the purchasers were unable to find anyone to do that, so Kapraki herself began to obtain false verifications of non-existent part-time jobs from various merchants she knew in the community (R. 3273-3275) (see, eg., the schedule as to counts 2-3 and 4, *infra* at p. 34).

Then in September-October 1968 Kapraki heard that the word was getting around on the street that Kapraki would make up a job so that one could buy a house. Worried, Kapraki related this to Cardona. Cardona told Kapraki that they no longer needed to have third parties involved to "verify" non-existent employment. At a recent sales meeting at Eastern Service Corporation, at which Harry Bernstein was present, the sales manager had announced that there was an accountant in the Bronx, Walter Blow, who prepared financial statements (profit and loss statements, balance sheets) on self-employed applicants. Cardona set up an appointment, at which Kapraki and several prospective purchasers were interviewed by Blow. Thereafter Cardona told Kapraki that it was not necessary for the purchasers to be interviewed by Blow, that Kapraki should just give Cardona the income figure needed for the self-employment and he would take care of the rest. Cardona said that Blow would make up the rest of the figures. (R. 3724-3735.) From that point on, the false employment made up by Kapraki and Cardona was usually self-employment "verified" by false financial statements (see the schedule, *infra* at pp. 34-35, as to counts 5-6, 7-8, 9, 10-11, 12-13, 14-15, 16, 17, 18-19, 20, 21-22, 23-24, 25-26, 27, 28, 31-32).

There were other specific problems which arose, and which Kapraki, with the help of Cardona, solved. Cardona told

Kapraki to write in the contract of sale a down payment large enough to cover the difference between the sales price and the estimated FHA mortgage amount, regardless of how much had actually been paid down. Otherwise, Cardona said, the purchaser would have to show that he had enough money in the bank to cover the closing requirements; these deposits would have to be verified by the bank. Kapraki's purchasers had no bank accounts. Cardona told Kapraki that the purchaser should sign an affidavit stating that he had saved the money for the down payment from his savings in the past five years (R. 3221-3229).

Another method to cover the mortgagor's required investment at the closing (see boxes 15 and 12 on the form 2900, C. 1129) which Cardona taught Kapraki involved the use of a false escrow letter, stating that money was being held in escrow for the closing of the house. Since Kapraki's purchasers did not have sufficient money to place in escrow, Cardona told Kapraki to take the stationery of one of her lawyers, have it printed up, type the escrow letter and forge the lawyer's signature. Kapraki did this (R. 3253-3265).*

Cardona also gave Kapraki advice about the number of dependents and the age of the prospective mortgagors. Cardona told Kapraki to minimize the number of dependents. He told Kapraki that if a buyer was too old, make him a little younger; if too young, make him a little older (R. 3540-3545).

* Despite these measures, it was necessary from time to time for Kapraki, Cardona, and Buckley to make changes in the original figures as to sales price and down payment contained in the contract of sale. Finally, Buckley told Kapraki to leave these figures blank. She would fill in the appropriate sales price and down payment at the time she prepared the application for a firm commitment (R. 4535-4538).

Cardona and Buckley made another suggestion to Kapraki to help maximize her profits. It was suggested that the applications be made under section 221(d)(2) of the Housing Act, rather than under section 203. Under the former section the government would insure a mortgage in an amount which was 97 percent of the FHA value. Thus the required down payment would be smaller, the mortgage amount higher, and Kapraki's profit larger (R. 3309-3312).

Buckley also had some advice for Kapraki as to how to inflate the apparent income of a prospective purchaser. Since the mortgagors generally were buying two or three family houses, they would be getting some rental income from the house which the FHA would consider in determining whether total income was sufficient. Buckley told Kapraki to leave the actual rental income out of the contract of sale. Then she (Buckley) would make up a rental income to inflate this monthly income of the mortgagor. Thereafter, Kapraki and Buckley followed this procedure, with Buckley creating false statements as to rental income. (R. 3324-3354.)

c. Specific instances of false credit applications in furtherance of the Cardona-Kapraki scheme.

Kapraki and Cardona developed a certain pattern in the procedures which they followed. Kapraki would interview the prospective mortgagor in her office. She questioned the mortgage applicant concerning credit information, including his employment and income.* If this income was not suffi-

* On some occasions the name of the mortgagor was itself fictitious. Kapraki met some individuals who wanted to purchase more than one house (e.g. Charles Bianchi, Roberto Rodriguez). However, if the mortgagor did not occupy the house, the mortgage amount would only be 85 percent of the amount applicable

[Footnote continued on following page]

cient to obtain an FHA insured mortgage on the property, Kapraki determined how much more income was required. As to third-party employment, Kapraki herself made up the false part-time job and arranged to obtain the false verification of employment. As to self-employment, either Kapraki, Cardona, or both of them together determined the nature of the false business which they would make up for the particular mortgagor. Kapraki gave Cardona the income figure which was needed for the mortgagor to meet the FHA requirements. Kapraki also gave Cardona money to obtain the false financial statements.* Cardona took the name and address of the applicant, the false self-employed business, and the income figure (which was in round numbers) to the accountant in the Bronx (Blow, and later Jose Abad**), and returned with full-blown financial state-

if the mortgagor occupied the house (R. 4014). This would reduce the profit potential. So Kapraki and these individuals made up fictitious names under which the applications were processed. After the closings the houses were later transferred to Bianchi or Rodriguez (see schedule *infra* at pp. 34-35, counts 9, 12, 14, 16, 17, 31). Although Cardona was not specifically aware of the fictitious mortgagors, he did participate in creating their false self-employment. Moreover, he had initially given Kapraki the idea. When Kapraki asked him about a person who wanted to buy more than one house, Cardona suggested that Kapraki process the second house using the buyer's mother's maiden name as the buyer's last name (R. 4014).

* Kapraki paid Cardona \$95 for a set of financial statements consisting of a profit and loss statement and a balance sheet (R. 3740, 3745-3746). She paid \$145 for a set consisting of a balance sheet and income tax returns (R. 4421). Cardona pocketed some of this money himself, and gave the rest to the accountant (R. 5457). Kapraki usually paid the money to Cardona in cash, but sometimes by check. Kapraki's testimony in this regard was corroborated by the introduction in evidence of these checks (R. 4542-4543, 4548-4567).

** In March 1969 certain events took place which led Kapraki and Cardona to use another accountant in the Bronx, Jose Abad, to prepare the false financial statements instead of Blow. This will be discussed *infra* at p. 41.

ments (profit and loss statements, balance sheets, and later income tax returns). Kapraki also made arrangements for the mortgagor or someone posing as the mortgagor to make a credit call to D & B, and give the D & B reporter the false information as to employment and income. The following schedule illustrates the results of this relationship on the substantive counts in the indictment:

<i>Count</i>	<i>Date*</i>	<i>False Employment</i>	<i>Mortgagor</i>	<i>Transcript</i>
Counts 2-3** (440-41st St.)	11/27/68	auto mechanic—American Gas Service Station (Bocar Service Station)	Heriberto Santos	R. 3133-3144, 3221-3235, 3244-3301, 3307-3399, 3520-3522.
Count 4 (347-57th St.)	12/4/68	butcher helper—Gregory Meat Wholesale	Raimundo Garcia	R. 3595-3611, 3633-3690.
Counts 5-6 (345-48th St.)	11/25/68	self-employed painter & decorator (part time) (Blow)	Jose Nogueros	R. 3701-3759, 3770-3793, 6673-6701.
Counts 7-8 (365-48th St.)	11/20/68	self-employed, Ben's Moving Co. (part time) (Blow)	Benito Gonzalez	R. 3797-3808, 3814-3857.
Count 9 (232 Lexington Ave)	10/28/69	self-employed, General Contractor (Blow)	Henry Marshall (fictitious)	R. 3881-3891, 3924-3942, 3953-3964.
Counts 10-11 (218-52nd St.)	1/28/69	self-employed, Body and Fender (Blow)	Fedael Rodriguez	R. 3965-4020.
Counts 12-13 (272-57th St.)	1/20/69	self-employed contracting (Blow)	Charles Arillo (fictitious)	R. 4192-4216, 4226-4249, 4283-4294.
Counts 14-15 (178-20th St.)	2/26/69	self-employed roofer (Blow)	Jose Ramos (fictitious)	R. 4415-4428, 4450-4466, 4470-4492, 4500-4520.

* The date given is the date on which the application for mortgage insurance was submitted to and received by the FHA. This is the date charged in each count of the indictment.

** Where two count numbers are listed, the second number is a count involving the same property in which D & B was charged as a defendant in connection with the credit report. The specific information in the schedule, however, relates to the first count number listed, involving the application for mortgage insurance.

<i>Count</i>	<i>Date</i>	<i>False Employment</i>	<i>Mortgagor</i>	<i>Transcript</i>
Count 16 (63 Malta St.)	4/1/69	self-employed roofer (Blow)	Arthur Aikens (fictitious)	R. 4522-4543, 4548-4585.
Count 17 (256-53rd St.)	6/16/69	self-employed Carpenter and cabinet maker (Blow & Abad)	Richard Bacon (fictitious)	R. 4586-4607, 4614-4654, 6974-6999, 7575-7579
Counts 18-19 (321-48th St.)	12/23/68	self-employed D/B/A Electrical Contractor (Blow)	Ismael Rodriguez	R. 4654-4675.
Count 20 (267-53rd St.)	12/3/68	self-employed Sheltry Cleaning & Waxing Co. (Blow)	Sheltry Holmes	R. 4675-4680, 4685-4704, 7312-7348, 7355-7358, 7461-7481.
Counts 21-22 (359-57th St.)	1/2/69	wife's occupation—self- employed dress maker (Blow)	Carlos Matos	R. 4804-4814, 4830-4836, 6885-6913.
Counts 23-24 (414-48th St.)	12/13/68	years employed* 5 years (self-employed cabinet maker & carpenter) (Blow)	Francisco Rivera	R. 4836-4855.
Counts 25-26 (416-52nd St.)	4/3/69	self-employed dress maker (Blow)	Maria Oquendo	R. 4855-4886, 6829-6869.
Count 27 (331-53rd St.)	3/27/69	self-employed alterations (part time) (Abad)	Nilda Rosa Ortiz	R. 4907-4935, 4939-4948, 7149-7171, 7190-7200, 7555-7568.
Count 28 (338A-20th St.)	4/17/69	auto repair—part time (self-employed) (Abad)	Enrique Perez	R. 4963-4986, 7568-7575.
Counts 31-32 (211-53rd St.)	2/4/69	self-employed sign painter (Blow)	Otto Spohn (fictitious)	R. 5088-5129.

* This is the only count on which the self-employment itself was not false. However, the mortgagor had only been self-employed for five months. The information on the application as to the number of years self-employed and the monthly income from the self-employment was false.

d. The Kapraki-Behar relationship regarding false credit applications.

As previously noted, appellant Florence Behar was in charge of the processing section at Eastern Service Corporation. As Assistant Vice President, it was her responsibility to sign the mortgagee's certificate on behalf of Eastern Service Corporation. Although she did not have the authority to refuse to process a particular real estate speculator's transactions, she did have the authority and discretion to report irregularities concerning a speculator's transactions (R. 11390, 11500-501). Behar took a special interest in Kapraki's applications. She assigned an experienced processor, Pat Buckley, to handle all of Kapraki's applications, rather than just put Kapraki in the pool of processors (R. 3113-3114).

During the period from the summer 1968 until March 1970, Kapraki had approximately 200 closings of FHA insured mortgages at Eastern Service Corporation. After each closing, except for those in a short period of time from May to June 1969, Kapraki gave money to Behar by placing an envelope in her desk drawer. The amount of money varied per closing. It started out in the spring 1968 at \$50 or \$75 per property. Shortly thereafter it increased to \$150 per property, then to \$200 per property as of November 1968, and finally to \$250 per property as of June 1969. The money was usually paid in cash, but sometimes by check. On four occasions in November 1968 Kapraki made out a check to cash, put the check in the envelope, and gave it to Behar. Behar's endorsement was on the back of these checks. On March 17, 1969, and on 19 other occasions from September 1969 through January 1970, out of the proceeds due her at the closing Kapraki had Eastern Service Corporation draw a check to her in the amount of \$250 or \$500. On these 20 occasions Kapraki endorsed the check, put it in an envelope, and gave it to Behar. One of these checks was endorsed and deposited in the account of Behar and her husband. Seventeen of these checks were endorsed and de-

posited in the account of Florence Friedman, Behar's maiden name. Two were cashed with and endorsed by Eastern Service Corporation. The money represented "tips" to Behar to expedite Kapraki's cases (R. 3101-3102, 3112-3113, 4331-4332, 4490-4512, 5361, 5376-5421, 5445-5455, 6060, 6067, 6077-6078, 11615-11633). Although there was no "quid pro quo" concerning the submission of false statements and the money Kapraki paid Behar, the money was a strong motive for Behar to close her eyes and disregard the truth or falsity of statements in each of the applications on Kapraki's properties which were submitted to the FHA.*

The mortgagor as well as the mortgagee are required to certify in the application that all information therein is true and complete to the best of their knowledge and belief (C. 1129). However, it was the practice in the industry for the mortgagor to sign the application in blank. The information would be typed in later by the approved mortgagee (R. 11382). Cardona, Behar, and Buckley explained this procedure to Kapraki. Behar told Kapraki that this procedure would avoid discrepancies between what the mortgagor stated initially and the information later received in the verification of employment form and the credit report. Kapraki followed this procedure (R. 3230-3234, 3244-3247).**

* It also explains her strong reaction when the FHA rejected any of Kapraki's applications. On these occasions Behar became very upset, and sometimes threw pencils or paper clips to vent her anger (R. 3659-3664).

** This procedure had to mislead the FHA. The date typed onto the application as the date on which the mortgagor signed the application was the same date as Behar signed the mortgagee's certificate (see, e.g., D 1). This left the impression that the mortgagor had signed after the information in the application had been filled in. Further, it defeated the purpose of the mortgagor's certificate. Finally, regarding Behar's state of mind, the procedure indicates that Behar could not possibly be relying on the mortgagor when she certified that all information is true and complete to the best of her knowledge and belief.

Pursuant to FHA requirements the verification of employment form was to be mailed directly by the approved mortgagee to the employer, filled out by the employer, and returned directly to the approved mortgagee by the employer in the enclosed envelope. There was only one exception to this procedure. An employee of the approved mortgagee was permitted to go to the place of employment, have the verification form filled out by the employer, and return it to the approved mortgagee. For obvious reasons, the approved mortgagee was not permitted to give blank verification of employment forms to a real estate speculator. Although Cardona, Behar, and Buckley were aware of these requirements, nevertheless they gave Kapraki blank verification of employment forms (R. 3276-3280). Kapraki was thus able to type the false information on these blank verification of employment forms herself (see, e.g., counts 2-3 in the schedule, *supra* at p. 34; see also government's summation in this regard, R. 20750-20752).

Two of the third-party employers which Kapraki used as false employment were the Bocar Service Station and the Gregory Meat Wholesale business. The owner of the gas station had purchased a house from Kapraki. The brother-in-law of one of Kapraki's employees owned the Gregory Meat Wholesale business. In the summer and fall of 1968 Kapraki arranged for them to falsely verify employment on several applications, paying them \$50 per application for the false verification (see counts 2-3 and 4 in the schedule, *supra*).* The fact that several persons who apparently worked at the same place were purchasing houses at about the same time aroused the suspicions of the D & B reporters (R. 7929-7950, 9688-9691). After receiving a call from D & B about

* As can be seen by the dates set forth in the schedule on which the applications in counts 2-3 and 4 were submitted to the FHA (11/27/68, 12/4/68), Kapraki had used the false employment therein several times prior to the submission of the particular applications involved in those substantive counts.

this, Behar called Kapraki and said that D & B was questioning whether so many prospective purchasers actually worked at the Bocar gas station. Behar said, "they all work there, don't they?" Kapraki replied that they did. Behar accepted Kapraki's word, and did not send an employee of Eastern Service Corporation out to the gas station to check with the supposed employer. When Kapraki told Cardona about this event, Cardona told Kapraki to insist that they all work there, but that she shouldn't use the same place all the time (R. 3287-3290).*

The use of verification of employment forms to falsely verify a part-time job in order to build up an applicant's income did not guarantee that the FHA would accept the application. In the summer or fall 1968 the FHA rejected such an application. It did not consider the part-time job, because the applicant earned more money on his part-time job than on his full-time job. In order to avoid suspicion in the future, Behar told Buckley to list the higher-paying job in the application as the full-time job, and the lower-paying job as the part-time employment. This was done on the application in counts 2-3 of the indictment (R. 3321-3323, 20753).**

As previously noted, in September-October 1968 Kapraki began to use fictitious self-employment "verified" by finan-

* Indeed, on the application in counts 2-3 Kapraki listed the name of the gas station as American Gas Service Station, because she was afraid someone would catch on if she used the name Bocar Service Station too often (R. 3280-3283). However, it was clear to Behar if she read the file that it was the same gas station, as the credit report mentioned both names—American Gas Service Station and Bocar Service Station (R. 3300).

** An examination of the applications and credit reports indicates that fictitious part-time employment was listed as the full-time employment, and the actual employment listed as part-time employment, on the applications in counts 2-3, 4, 10-11, 18-19, and 20.

cial statements prepared by Blow on her transactions. In the fall or winter 1968 Fey, who was looking at the applications on Kapraki's properties after the closings for the purpose of selling the mortgages to a permanent lender, began to get suspicious about Kapraki's transactions. On occasion he also saw Kapraki's mortgagors at the closings. His suspicions were based on his observations that most of Kapraki's mortgagors were self-employed "verified" by financial statements prepared by one accountant (Walter Blow), that despite having a substantial self-employed business for many years they spoke only Spanish, and that there were too many delinquencies on Kapraki's properties. Fey saw about 50 applications containing Blow's financial statements "verifying" self-employment. He said that he would have to be stupid and naive not to realize that something was wrong. (R. 10726-728, 10743-758, 10774, 11029, 11036, 11389, 11523-525.) Behar was a competent, experienced processor who saw these same files when she signed the mortgagee's certificate. She spent hours with Kapraki going over these files.* (See, e.g., R. 10733-734, 11498-502, 14156-158.) In the fall or winter 1968 Fey had a conversation with Behar about Kapraki's transactions. Fey told Behar that he thought that Kapraki's deals were "phonies". Behar replied, "This is what Mrs. Kapraki gives us." Fey retorted, "Florence, let's stop the bullshit. You know as well as I that these deals are phonies" (R. 10772-10775). After this conversation, Behar continued to sign the mortgagee's certificate on Kapraki's transactions without raising any questions.

* Further, in the fall 1968 Behar suggested to Kapraki that they become partners on certain houses and split the profits thereon (R. 3872-3878, 3954-3963). In December 1969 or January 1970 Behar suggested to Kapraki that she form another corporation, so that the FHA would not know she had so many deals being submitted to the FHA. Kapraki did this. On Behar's suggestion, Kapraki at first signed her name on behalf of the new corporation illegibly on the papers. Then she used her maiden name (R. 5423-5428).

There came a time when Fey issued instructions to Kapraki and to the processing department that the corporation would no longer accept financial statements prepared by Walter Blow (R. 4603-4605, 11508-514). Fey issued that instruction in March 1969 (R. 4919).^{*} When Kapraki told Cardona about the problem, Cardona said that he would make arrangements to obtain the financial statements from another accountant whom he knew (R. 4606). In March 1969 Cardona did recruit another accountant in the Bronx, Jose Abad, to prepare the financial statements. Cardona gave him the name of the mortgage applicant, the type of self-employment, and a flat figure as the net profit of the business. Cardona told Abad to make up the rest of the figures in the financial statements, just as Blow had done. He gave Abad a sample set of financial statements prepared by Blow. Cardona assured Abad that nothing would happen, that this way everybody is making some money (R. 7550-7554, 7570, 7580, 7590-7592). Cardona paid Abad \$30 or \$40 in cash per set of financial statements (R. 7552-7553, 7565).^{**} During this period of time Abad never met Kapraki, and talked with her on the phone only once. Cardona told Abad to deal only with him (R. 7573-7575, 4619-4622). On only one occasion did Abad ever talk to the mortgage applicant on whom he was preparing the financial statements. This conversation took place on the telephone. Abad was unable to obtain any financial information from the applicant, and made up the figures (R. 4619-4622, 7596-7597, 7618-7622, 7670). Cardona and Kapraki used financial statements prepared by Abad on approximately 10-15 instances (R. 11570). The result of the Kapraki-Cardona-Abad relationship is shown on the schedule, *supra* at p. 35, in counts 17, 27, and 28. After Blow's

^{*} Shortly thereafter the accountant Blow died in a fire at his house (R. 4615-4616).

^{**} As noted earlier, Kapraki paid Cardona \$95 or \$145 per set, depending on whether income tax statements were included.

ouster, Behar continued to sign without question the mortgagee's certificate on these applications containing financial statements prepared by Abad, despite the fact that they involved the same pattern as the Blow statements. However, in May 1969 Behar did use her leverage in an attempt to increase the amount of money Kapraki was paying her per case. Behar said that her work was worth a lot more money. Although at first Kapraki agreed to increase the amount to \$750 per case, they finally reached agreement on \$250 per case (R. 4331-4340).

Behar's state of mind toward Kapraki's transactions was also reflected by her concern that the "right man" in the FHA examine the credit application.* On one occasion, when Kapraki asked Behar why a particular application on Behar's desk had not been submitted to the FHA, Behar told Kapraki about the importance of having the "right man" examine the application; that person was not in the FHA office that day (R. 4454-4455).

On another occasion a question was raised as to so many applicants being self-employed, making a decent income, and yet not having any telephones to conduct their business.** Cardona called Kapraki and told her that Behar would be calling about this question. Cardona told Kapraki to tell Behar that the applicants were self-employed, that they were hard-working people and did not need telephones, that their customers came to the homes of the applicants. When Behar questioned Kapraki about the matter, she answered Behar as Cardona had suggested. Behar replied, "As long

* There was no direct evidence at the trial that any FHA credit examiners were being bribed by Eastern Service Corporation. However, there was circumstantial evidence to that effect—evidence that credit applications were improperly assigned to credit examiners John Denis and Ann Dupre (R. 12951-955, 14145), and evidence that Dupre was seen in Bernstein's office at Eastern Service Corporation (R. 14147, 14156).

** Presumably the question was raised by the D & B reporters (see, eg., R. 8079-8081a, 8113-8114, 8126, 8993, 9635, 9642).

as you say so, okay" (R. 4628-4631). Behar accepted this absurd explanation by Kapraki, instead of sending an employee of the corporation out to check with the mortgage applicant. Indeed, when the same question was raised on the telephone by the FHA credit examiner, John Denis, Behar gave the same explanation as Kapraki had given her (R. 4631, 4458-4461). Later, on another application, when the FHA requested in writing that the question of the lack of any telephone be clarified, Behar told Kapraki to type up an affidavit setting forth the same explanation and have the applicant sign it (R. 4634-4643). Even after a written request for clarification by the FHA, Behar still did not take the simple step of sending an employee to the applicant's house to check on the business.

Finally, the state of mind of those persons associated with Eastern Service Corporation is reflected by their actions with respect to D & B. Behar, Buckley, and Rose Bernstein (Rose Shorenstein) all called D & B from time to time regarding problems with the credit reports. They complained about the manner in which the credit reports were written, demanded that the reports with negative information be changed so there would not be problems in the FHA accepting the reports, and wanted the processing of the credit reports to be expedited regardless of the difficulties encountered by D & B in verifying the information (R. 8707, 8860-8866, 8898-8913, 8924-8957, 9034-9039, 9052, 9105-9106, 9301- 9304, 9307-9309, 9601-9602, 9676-9689, 10089-10101, 10364-10375). In a conversation with D & B's reporting supervisor, David Miller, Behar threatened to terminate Eastern's contract with D & B if the negative information was not removed (R. 10099). On two occasions, Behar complained to Fey about the tardiness of the credit reports. Fey called Prescott and threatened to terminate Eastern's contract with D & B unless the credit reports were expedited (R. 10814-10827, 10841-10842). There were many occasions when the initial credit report on a mortgage applicant did not mention the fictitious part-time self-employ-

ment. On several occasions when this happened, Behar called Miller at D & B's office, and complained. Behar said that the applicants had mentioned the self-employment in their conversations with the D & B reporters, and that the reporters did not mention it in the credit reports. She threatened to take away Eastern's business if D & B did not include the self-employment. After the applicants made a second credit call to Eastern Service Corporation, another credit report was issued referring to the self-employment (R. 4145-4158, 10058-10066, 10099).^{*} There did come a time in the fall of 1969 when Eastern Service Corporation began to use another credit company to prepare most of its credit reports. Harry Bernstein issued the instruction in this regard to Behar. Behar explained the reason for this change to Kapraki—D & B wasn't preparing the reports fast enough, and was not including the "right" information in the reports (R. 5421-5422).^{**}

It is clear that there came a time fairly early on when Florence Behar and through her, Eastern Service Corporation, adopted a second object in the conspiracy to thwart the lawful operation of the FHA program—the second object being the submission to the FHA of applications on Kapraki's properties containing false statements.

e. The Bernsteins' relationship with the false credit applications.

The relationship between the Bernsteins and Kapraki on the bribery aspect of the conspiracy, which began in the summer 1968, has previously been discussed. As noted

^{*} Cardona, Buckley, and Behar also gave Kapraki advice as to how to avoid problems caused by outstanding loans and judgments which her mortgage applicants had (R. 4160-4180).

^{**} In light of the issues on appeal, only passing reference has been made herein concerning the evidence involving D & B. For an overview of the evidence implicating D & B, see the government's summation in this regard (R. 20855-21092).

earlier, Harry Bernstein was the president and sole stockholder of Eastern Service Corporation. As such, he set the corporate policy of Eastern Service Corporation. Bernstein hired Fey as a vice president, and gave him more and more responsibility. Eventually Fey was placed in charge of the origination department. Fey reported daily to Bernstein concerning the business of the corporation, including any problems that came up (R. 10628-636, 10653-661, 10667-669, 11049-050).

As noted earlier, in the fall or winter 1968 Fey's suspicions were aroused concerning Kapraki's transactions. However, Fey did not have the authority to terminate the corporation's relationship with Kapraki (R. 11390, 11500). Fey reported his suspicions to Bernstein. Yet, despite the fact that Bernstein obviously trusted Fey's business judgment (having given Fey more and more responsibility), Bernstein brushed off Fey's advice concerning Kapraki in two critical conversations which took place in the spring 1969.* Fey told Bernstein about the delinquencies on Kapraki's transactions, that the mortgagors were not making the mortgage payments. Bernstein replied, "We don't investigate these applications, we don't play detective, we send these applications down to the FHA and they decide whether they are good or bad applications, we don't" (R. 10777).** Within a month or so, Fey had a second conversation with Bernstein concerning Kapraki. Rose Bernstein was also present. Fey was upset about Kapraki's transactions, and told Bern-

* For a discussion of Bernstein's profit motive in connection with Kapraki's transactions, see R. 20831-20843.

** This conversation took place prior to the instruction Fey gave that Blow's financial statements would no longer be accepted (R. 11272-11273). As previously noted, the instruction as to Blow was given in March 1969. Moreover, Bernstein's attitude toward his affirmative obligation to the FHA is reflected several years earlier, when Bernstein told Fey that he should not pass judgment on the applications, that's up to the FHA (R. 10636-640).

stein that dealing with Kapraki was hurting the company. Fey told Bernstein about the delinquencies on her accounts, and said that he believed the Blow financial statements were "frauds". Fey urgently advised Bernstein that the company should stop processing Kapraki's transactions, that it would come back to haunt them. Bernstein asked Fey what he was getting so upset about, and said, "Look, we get her applications, we receive them, we process them, we send them down to the FHA and it is for them to decide whether it is a good application or a bad one." Rose Bernstein commented to Fey, "do [you] realize how many points Eastern Service charges Mrs. Kapraki on her applications?" Fey said that that was beside the point (R. 10778-10782a, 11555-11558.) *

The corporation continued to process Kapraki's applications (R. 10795-10796). ** Thus there came a point in time, at least by the spring 1969, when Harry and Rose Bernstein adopted the second object of the conspiracy in connection with Kapraki's properties—the submission to the FHA of applications containing false statements. This was in furtherance of the criminal scheme to thwart the lawful operation of the FHA program.

* The attitude of Rose Bernstein toward the truth or falsity of statements contained in credit applications submitted to the FHA is also reflected by her conversations with D & B employees, referred to earlier. The attitude of Harry Bernstein in this regard, particularly toward Kapraki's applications, is also reflected by the leverage he used in attempting to get Kapraki to make mortgage payments on behalf of her delinquent mortgagors which she had no legal obligation to pay (R. 4797-4800; see also 4756-4769). It is further reflected by his reaction to D & B when he was specifically told about the problems D & B was having in verifying information in the credit reports (R. 10169-10177), and his decision to start using another credit company to prepare the credit reports (R. 5421-5422).

** A year later, in March 1970, after Kapraki's departmental hearing which resulted in the revocation of her real estate license, Kapraki was told that Eastern Service Corporation would no longer process her applications (R. 5465-5468, 10782a-10785).

f. Summary.

Although Kapraki and Cardona were the ones who actually created the false information as to employment and income, it is clear that acting alone they could not have been successful in their scheme. Kapraki needed an approved mortgagee whose chief processor, even after her suspicions were aroused regarding false information, was willing to consciously close her eyes and ignore the truth or falsity of the statements in the credit applications. Kapraki needed an approved mortgagee whose president, even after his suspicions were aroused, was more interested in keeping a speculator's volume business than in fulfilling his affirmative duty to the FHA. Finally, Kapraki needed the context of mortgages insured by the FHA; for only in such a context, where the risk of default has been transferred from the approved mortgagee to the FHA, will a mortgagee be so willing to look the other way and act recklessly in connection with the truth or falsity of credit information on a mortgage applicant.

POINT I

The false statement counts of the indictment sufficiently charge a crime.*

Appellants Harry Bernstein, Eastern Service Corporation, Behar and Cardona contend that the false statement counts under 18 U.S.C. § 1010 fail to sufficiently charge a crime. The grounds for this attack are: (1) failure to specify or identify the statements alleged to be false; and (2) failure to allege the essential element of knowledge that the statements were false.

(1)

There were 18 false statement counts in the redacted indictment involving one or more of the appellants herein. As submitted to the jury, appellant Harry Bernstein was charged as a defendant and convicted on one of those counts; appellants Eastern Service Corporation and Behar were charged and convicted on all 18 counts; appellant Cardona was charged and convicted on 17 of those counts. The form of each count is identical, differing only as to the date on which the crime is alleged to have been committed, the particular defendants named therein, and the property address as to which the application relates. Count Twenty-Five of the redacted indictment reads as follows:**

On or about the 3rd day of April 1969, within the Eastern District of New York, the defendants Rose Bernstein, also known as Rose Shorenstein, Harry Bernstein, Florence Behar, Ortrud Kapraki, Melvin Cardona and Eastern Service Corporation,

* In response to Point IV of Bernsteins' brief, Point III of Behar's brief, and Point II of Cardona's brief.

** Count 25 is selected as an example only because it is the count in which all four appellants herein were charged and convicted. Although appellant Rose Bernstein is also named in the count, the count was dismissed against her on consent at the end of the government's case (R. 15487).

for the purpose of influencing the Federal Housing Administration of the Department of Housing and Urban Development to insure a loan and advance of credit by the defendant Eastern Service Corporation, did knowingly make, pass, utter and publish false statements in an application for mortgage insurance on property located at 416 52nd Street, Brooklyn, New York. (Title 18, United States Code, § 1010 and § 2).

At the outset it should be noted that the indictment identified the particular false document involved (application for mortgage insurance with respect to a particular property), the bill of particulars identified the false statements in that document which the government would prove at trial (see B 722 as to this particular count (count 20 of the original indictment); see B 692-820 for particulars as to other counts),* and a copy of each application was submitted to the jury with the statements alleged to be false circled in red (see, e.g., D. 1). Appellants contend, however, that the false statements are required to be specified in the indictment itself.

The Fifth Amendment to the United States Constitution sets forth the right of an accused in a criminal prosecution to an indictment by a grand jury. The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . ." Rule 7(c)(1) of the Federal Rules of Criminal Procedure implements this protection. It provides in pertinent part:

The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.

* The bill of particulars was provided with respect to the counts as numbered in the original superseding indictment (72 Cr. 587). For the convenience of the Court, there is attached hereto in the addendum to this brief Schedule D, setting forth the correlation between the counts as numbered in the redacted and original indictment (72 Cr. 587).

Rule 7(f) further provides for the filing of a bill of particulars.

The primary criteria by which the sufficiency of an indictment is to be measured are twofold: (1) whether the indictment contains the essential elements of the crime and adequately informs the defendant of the nature of the charge he will have to meet; and (2) whether the charge is sufficiently specific to protect the defendant from again being put in jeopardy for the same offense. *Russell v. United States*, 369 U.S. 749, 763-64, 82 S. Ct. 1038, 1047 (1962); Wright, *Federal Practice and Procedure* (Criminal), § 125 (1969). However, the precision and detail once demanded in criminal pleading is no longer required. Rule 7(c) was designed to eliminate the rules of technical and formalized pleading in effect prior thereto, and to simplify the requirements of criminal pleading. Wright, *supra*, at § 123. An indictment need do "little more" than to track the language of the statute and state in approximate terms the time and place of the alleged crime. *United States v. Tramunti*, —F.2d— (2d Cir. March 7, 1975, slip op. 2107, at 2151-52); *United States v. Fortunato*, 402 F.2d 79, 82 (2d Cir. 1968), *cert. denied*, 394 U.S. 933 (1969).

There are three essential elements involved in the crime of making false statements in violation of 18 U.S.C. § 1010: the making of a false statement in an application; knowledge that it is false; the purpose of influencing in any way the action of the Department of Housing and Urban Development. *United States v. Leach*, 427 F.2d 1107, 1111 (1st Cir.), *cert. denied*, 400 U.S. 829 (1970). It is perhaps noteworthy that in setting forth the essential elements of a violation of § 1010, the Court in *Leach* gave no indication that specification of the false statements was a requirement of a valid indictment. Indeed, the Court in that case held that it was not an abuse of discretion to deny a motion for a bill of particulars specifying the false statements referred to by the general allegations of the conspiracy count.*

* The indictment in that case consisted of two substantive
[Footnote continued on following page]

Although appellants claim that the authorities requiring specification of the false statements are "abundant" (see p. 48 of Bernsteins' brief; p. 29 of Cardona's brief), they cite only two cases in this regard — *United States v. Borland*, 309 F. Supp. 280, 287-89 (D. Del. 1970), and *United States v. Devine's Milk Laboratories, Inc.*, 179 F. Supp. 799 (D. Mass. 1960).^{*} The district court in each of those cases held that the allegations of the conspiracy count which merely paraphrased the general language of 18 U.S.C. § 1001 were not sufficiently particular and were legally insufficient. However, all the counts in those cases did was to set out the elements of the offense in the general language of the statute. No further identification was made of the particular false documents or false statements involved.

These rulings were simply applications of the principle that where a statute employs broad language descriptive of the general nature of the offense, the indictment must contain some **additional** specification informing the accused of the specific offense with which he is charged. See *Russell v. United States*, *supra*, 369 U.S. at 765, 82 S. Ct. at 1047-1048. The false statement counts herein did contain

counts which did specify certain false statements and a conspiracy count which did not. The motion for specification of false statements was addressed to the conspiracy count. The attitude of the Court toward a requirement of specification in a bill of particulars (that it is not required), even though only reflected as to a conspiracy count, supports the government's position herein. If such specification is not even *required* in a bill of particulars, it would *tend* to follow that it is not *required* in the indictment itself (even a substantive count).

^{*} The two briefs do go on to state that the "counts of the present indictment utterly fail to meet the standards of specificity enumerated in" *United States v. Tremont*, 429 F.2d 1166, 1167, n. 1 (1st Cir.), *cert. denied*, 400 U.S. 831 (1970) and *Gevinson v. United States*, 358 F.2d 761, 763, n. 3 (5th Cir.), *cert. denied*, 385 U.S. 823 (1966). The statement is not supported by an examination of those cases. The opinions reproduce in the footnotes counts containing specification of false statements. However, there is no discussion as to whether such specification is required, and no enumeration of standards of specificity in this regard.

such additional specification — the counts were more specific than those in either of the aforementioned two cases cited by appellants. The essence of the crime involved herein is the submission of a false document with the requisite knowledge and intent. *Cohen v. United States*, 178 F.2d 588, 591 (6th Cir. 1949), *cert. denied*, 339 U.S. 920 (1950). The filing of the false document constitutes the crime. *Tripp v. United States*, 381 F.2d 320, 321 (9th Cir. 1967); *Bins v. United States*, 331 F.2d 390, 393 (5th Cir.), *cert. denied*, 379 U.S. 880 (1964). The counts herein did specify and identify the particular false document involved in each count—an application for mortgage insurance on a particular property (e.g.: Count Twenty-Five—"application for mortgage insurance on property located at 416 52nd Street, Brooklyn, New York").

Appellants have misconceived the nature of the specificity required herein. This is demonstrated by reading what they view as the "operative language" in each count—that the defendants "... did knowingly make, pass, utter and publish false statements in an application for mortgage insurance . . ." (see p. 44 of Bernsteins' brief, pp. 22-23 of Cardona's brief). What appellants have omitted in their view of the operative language is the very particularization which makes the indictment sufficient—the specification of the property which serves to forever fix and identify the particular false document. If each false statement in a document constituted a separate crime, then there might be more of a problem with respect to the sufficiency of the indictment herein. For then the indictment would not protect the defendant against a later prosecution based on another general allegation of false statements in the same application for mortgage insurance.* However, since as noted above the submission of each false document is what constitutes a separate crime, the specifica-

* It is clear, however, that the entire record of the proceedings may be referred to in considering a double jeopardy claim. See *Wright, supra*, § 125 at p. 233.

tion of that document serves to identify what constitutes the essence of the crime and protects the defendant against any subsequent prosecution based on false statements in the same document.*

Concededly, as shown by the two district court cases relied upon by appellants, some identification other than merely tracking the language of the statute is required. The critical question is how much more specification is required. As noted earlier, an indictment need do "little more" than to track the language of the statute and state in approximate terms the time and place of the alleged crime. *United States v. Tramunti, supra*, slip op. at 2151-52; *United States v. Fortunato, supra*, 402 F.2d at 82. This was done herein.

Appellants have cited no cases directly on point, and research has disclosed none in which the question is raised concerning a false statement indictment in the exact form involved herein. However, *Cohen v. United States, supra*, involved an analogous indictment under the predecessor of the statute involved herein, and the holding therein strongly supports the government's position herein. In that case various counts of the indictment alleged that the defendants made a false FHA credit application in that the signatures were obtained by fraud and misrepresentation and without any intention or knowledge by the signator to apply for an

* The Supreme Court has held that an indictment charging the mailing of an obscene letter need not specify the particular portions which were allegedly obscene. See the discussion in fn. 12 of the majority opinion and fn. 11 in the dissenting opinion in *Russell v. United States, supra*. Although this was apparently based on an exception, prevailing in obscenity cases, to the usual indictment rules, it surely demonstrates that the issue involved herein is not of constitutional dimensions. Moreover, the decisions were made at a time when rules of technical and formalized pleading were in effect. Rule 7(c) put an end to such technical and formalized rules.

advance of credit. Defendants contended that the indictment was insufficient and did not inform them of the nature of the offense, in that the details of the fraud and misrepresentation in obtaining the signatures were not alleged. The Court held (178 F.2d at 591):

But this is not a prosecution for obtaining property or money under false pretenses, in which case the false pretenses must be set out specifically. The *essence* of the crime here is the uttering and publishing of *false documents* with intent to influence the FHA [citations omitted]. *The evidential allegations as to how the signatures were obtained were surplusage.* The various offenses were fully and clearly charged since the counts of the indictment specified the time and place of each transaction, and the uttering and publishing, in each case, of a *false credit application and note, particularly described*, in violation of the statute. [Emphasis supplied.]

See also *United States v. Varano*, 113 F. Supp. 867 (M.D. Penn. 1953); but see *United States v. Pierson*, 116 F. Supp. 359 (E.D. Texas 1953) (involving a pre-trial determination under a different statute). Similarly in the case at bar the essence of the crime is the submission of *false documents*. Any allegations as to the specific false statements therein would be evidential and surplusage. The specification in the indictment of the false application for mortgage insurance, particularly described by the identification of the type of document and the specific property it relates to, fully meets the standards of specificity required in an indictment.

In *United States v. Alo*, 439 F.2d 751, 756 (2d Cir. 1971), the indictment charged an obstruction of the due administration of federal laws by giving "false and evasive answers" as a witness in a proceeding before the SEC. Appellants attacked the sufficiency of the indictment in that it failed to specify the false and evasive answers. The claim is strikingly similar to the claim of failure to specify the false statements made herein. This Court held in

Also that the indictment was sufficient. Another analogous case is that of *United States v. Weiss*, 491 F.2d 460, 466 (2d Cir.), *cert. denied*, — U.S. —, 95 S. Ct. 58 (1974). Appellants therein claimed that the indictment (alleging an obstruction of justice by failing to produce certain documents before a grand jury) failed to specify in what way their conduct was done "corruptly". The trial court instructed the jury that it must find some affirmative conduct such as destruction, concealment or removal of the documents. No such affirmative conduct was specified in the indictment. This Court in *Weiss* held that such specification was not needed to satisfy the requirements of an indictment. Surely such specification of "false and evasive answers" or of "corruptly" is as important to a defendant charged with those crimes as is the specification of false statements to a defendant charged with the crime herein. As in those cases, the indictment herein is sufficient.

The sufficiency of the indictment is not a question of whether it could have been made more definite and certain. If the indictment meets the minimal requirements of sufficiency and a defendant needs more definite information, it can be obtained by moving for a bill of particulars pursuant to Rule 7(f). *United States v. Debrow*, 346 U.S. 374, 376-378, 74 S. Ct. 113, 115-116 (1953); Wright, *supra*, at § 123.*

* Appellants point to an analogy between the crime of perjury and the crime of submitting false statements, and claim that in a perjury indictment there is a requirement that the false testimony be specified. Even if that is a requirement in a perjury indictment, the analogy is not persuasive here. While the essence of the crime of perjury is the making of a false statement in the testimony, the essence of the crime herein is the submission of a false document. Moreover, materiality is an essential element of a perjury count, whereas it is not an essential element of the crime herein. Likewise, the reference to the form indictments put out by the Department of Justice is not controlling or persuasive. There is no implication in those guidelines that the form indictment is setting forth only the minimal requirements of an indictment; indeed, the fair import is that the form indictments set forth more than what is minimally required.

As this Court noted in *United States v. Alo, supra*, 439 F.2d at 756, n. 13, the "venerable principle that a bill of particulars cannot 'give life to what was dead when it left the grand jury' [citation omitted] does not mean that we must ignore the relief which a bill is designed to provide and which [the defendant] received in this case." * The Court took note of the bills of particulars which specified the false and evasive answers and the manner in which the answers were false, and found that the indictment and bills of particulars clearly satisfied the notice requirement of the Sixth Amendment. Similarly herein appellants requested and the government provided a bill of particulars specifying the statements which the government would rely on and prove were false at the trial. There is no claim that appellants were misled to their prejudice as to any of the false statements proven at trial. Indeed, at trial there was no real dispute by appellants as to the falsity of the statements; rather the critical issue was whether appellants had the requisite knowledge. The indictment as amplified by the bill of particulars made crystal clear to appellants the nature and cause of the government's case and afforded them the opportunity fairly and adequately to prepare their defense. See also *United States v. Sperling*, 506 F.2d 1323, 1344 (2d Cir. 1974); *United States v. Fortunato, supra*, 402 F.2d at 82.

Finally, appellants contend that the failure to specify the false statements in the indictment allowed the government for the purposes of the trial to assign as a false state-

* The Court went on to note in the footnote that that venerable "principle touches not on the defendant's notice of the case he will have to meet, but on his fifth amendment right to be proceeded against by grand jury indictment. Specificity in the indictment is a corollary of the grand jury right because a loosely phrased accusation would allow the prosecutor to proceed at trial on a theory which the grand jury had never considered. A bill of particulars obviously is no safeguard against such an evasion of the fifth amendment. But no such claim is raised in this case." Such a claim is raised herein, and will be met *infra*.

ment any of the statements contained in the document involved in a particular count, that there is no way of determining which false statement in a particular document the grand jury had determined was false or whether the same statement was considered false by the trial jury as by the grand jury.* Appellants cite *Stirone v. United States*, 361 U.S. 212, 80 S. Ct. 270 (1960),** and *Russell v. United States*, *supra*, in support of this argument.

Appellants have misconceived the "very core of criminality" under the statute involved herein. The insufficiency of the indictment in *Russell* was based on the failure to specify or identify an element (pertinency to the subject matter under inquiry) which constituted the "very core of criminality" under the particular statute involved therein (369 U.S. at 764, 82 S. Ct. at 1047). The Supreme Court noted that the subject matter of the inquiry is *central* to every prosecution under that particular statute, and that guilt depends *crucially* on what the subject matter of the inquiry was. However, under 18 U.S.C. § 1010 the critical element in almost every prosecution (certainly in the prosecution against these appellants) is the requisite knowledge and intent; rarely is there a dispute as to what was

* The application forming the basis of each charge was marked as an exhibit before the grand jury and specifically identified in each count of the indictment. Hence the prosecutor could not change, add to, or substitute for the particular document found to be false by the grand jury. Likewise, it is clear which document the grand jury found to be false, and that the document considered false by the trial jury was the same document considered false by the grand jury.

** In *Stirone* the jury was allowed to convict on a critical element specifically not identified by the grand jury. The Court stated (361 U.S. at 218, 80 S.Ct. at 274): "It follows that when only one particular kind of commerce is charged to have been burdened a conviction must rest on that charge and not another, *even though it be assumed that under an indictment drawn in general terms a conviction might rest upon a showing that commerce of one kind or another had been burdened*" (emphasis supplied).

false. Guilt depends *crucially* on whether a defendant had the requisite knowledge and intent. Further, at trial there simply was no real dispute by appellants as to the falsity of the statements; rather the critical issue was whether appellants had the requisite knowledge.* In *Russell* the chief issue (pertinency to the subject matter of the inquiry) was the very one left undefined by the indictment.**

Moreover, in the court's charge the jury was instructed to limit itself, in determining whether there were false statements in any particular application for mortgage insurance, to statements concerning employment and income therefrom, and the mortgagee's certificate (C. 507). On each of the 18 specific applications identified in the 18 substantive false statement counts against appellants, the court circled in red the particular statements as to employment and income therefrom and the mortgagee's certificate which were alleged to be false (see, e.g., D. 1). These documents with particular portions circled in red were read to the jury and given to them for use in their deliberations (C. 517-536). Thus, the case as submitted to the jury was limited to only those false statements which formed the very "guts" of the case—fictitious employment and income therefrom, and the mortgagee's certificate. As a practical

* Appellant Behar explicitly concedes that this was so on p. 35 of her brief—"there was never any issue as to the fact that the statements were false".

** Again it is clear that appellants' argument does not reach constitutional dimensions when applied to the indictment herein. For the argument was long ago rejected by the Supreme Court in *Rosen v. United States*, 161 U.S. 29, 34, 16 S. Ct. 434, 435-36 (1896), where the defendant unsuccessfully argued that he was entitled to know the particular parts of a document which the grand jury had found to be obscene. The constitutional right to indictment by a grand jury is satisfied where defendants are tried on "minimally sufficient allegations," as to which the grand jury has made a determination "that it considers those allegations sufficient to warrant the exercise of its prosecuting discretion" (see *United States v. Cirami*, 510 F.2d 69, 72 (2d Cir. 1975)).

matter, this was the "guts" of the case both before the grand jury and the trial jury; in the case as so limited, there is simply no real possibility that there was any variance between the findings of the grand jury and the trial jury. There is simply no real difficulty in ascertaining the basic false statements involved in the case.*

* Fictitious self-employment (and thus the income therefrom) formed the basis of the falsity in the following 15 counts: 5, 7, 9, 10, 12, 14, 16, 17, 18, 20, 21, 25, 27, 28, 31. Fictitious employment by others (and thus income therefrom) formed the basis of the falsity in counts 2 and 4 of the redacted indictment. Indeed, in some of these counts the person himself was fictitious; as to these counts the falsity of the self-employment and income therefrom is crystal clear (counts 9, 12, 14, 16, 17, 31). The thrust of the presentation at trial and before the grand jury was the fictitious self-employment "verified" by the Blow and Abad financial statements (15 counts) and the fictitious employment at the Bocar gas station and the Gregory Meat business (2 counts).

This leaves only count 23 of the redacted indictment for consideration as to whether there is any possible question as to what was considered false by the grand jury. Contrary to the implication on p. 26 of Cardona's brief, there was no amendment of the Bill of Particulars on any of the false statement counts in which appellants were named as defendants (C. 278-280). As to count 23 of the redacted indictment (count 18 of indictment 72 Cr. 587) the alleged false statements as submitted to the trial jury were the number of years the mortgagor was self-employed and the income from that self-employment. These specifications were so made in the government's Bill of Particulars as to that count (B. 720). This was the only count on which the self-employment itself was not fictitious—the only count on which there can be any question as to whether the grand jury considered false the particular statements submitted to the trial jury. Kapraki testified at trial that the mortgagor Francisco Rivera told her that he had been self-employed for 5 months. Kapraki testified that the number of years employed on the application (5 years) and the income from the self-employment were false (R. 4840-4842). Rivera testified before the grand jury, and his testimony there was to the same effect. So once again we have a situation where there is no real question as to a variance between the findings of the grand jury and the trial jury.

The falsity of the statements simply was never a critical issue in this case. From start to finish, the critical issue was always whether the defendants had the requisite knowledge as to the false statements.

In *Russell* there was confusion and a real difficulty in determining what the subject matter of the inquiry was (369 U.S. at 767-768, 82 S. Ct. at 1048-1049). The principle of specificity set forth in *Russell* is limited to a situation where such a real difficulty is involved. See *United States v. Alo*, *supra*, 439 F.2d at 756, n. 13; *United States v. Steruman*, 415 F.2d 1165, 1168 (6th Cir. 1969), *cert. denied*, 397 U.S. 907 (1970); *Marshall v. United States*, 355 F.2d 999, 1003 (9th Cir.), *cert. denied*, 385 U.S. 815 (1966). It is inapplicable herein, where the false document was identified and there is no difficulty in ascertaining the false statements involved in the case as submitted to the jury.

Any defect in the failure to specify the false statements in the indictment simply did not prejudice appellants herein. Since the indictment contains minimally sufficient allegations of the essential elements of the crime, there is no prejudice, and no substantial right is affected, appellants are not entitled to a reversal of their convictions under § 1010 on the ground that the indictment could have been more specific. See Rule 52(a) of the Federal Rules of Criminal Procedure; *Russell v. United States*, *supra*, 369 U.S. at 762, 82 S. Ct. 1046; *Harlow v. United States*, 301 F.2d 361, 367-368 (5th Cir.), *cert. denied*, 371 U.S. 814 (1962); *Norris v. United States*, 152 F.2d 808, 810 (5th Cir. 1946).

(2)

The further contention is made that the 18 false statement counts involving appellants fail to allege the essential element of knowledge of the falsity of the statements. However, this overlooks the fact that each false statement count of the indictment specifically charges that the defendants "did knowingly make, pass, utter and publish false statements" (emphasis supplied).

Appellants point to the fact that the allegations do not follow the form of the statute, which uses the language

"makes, passes, utters or publishes any statement, knowing the same to be false". The contention that there is an essential difference between the two forms of language is frivolous. An offense need not be charged in the same language as the statute. An indictment under modern rules of pleading is to be given a fair and reasonable construction. The element of knowledge is sufficiently alleged if the language used fairly imports knowledge. Surely the counts herein fairly advise each defendant that he is being charged with knowledge that the statements were false. See *United States v. Berlin*, 472 F.2d 1002 (2d Cir.), *cert. denied*, 412 U.S. 949 (1973); Wright, *supra*, §§ 123, 125.*

POINT II

The evidence was sufficient to support a finding of a single conspiracy and to support appellants' conspiracy convictions; there was no prejudicial variance; the court properly instructed the jury in this regard; and the court did not abuse its discretion in denying motions for severance.**

All appellants vigorously contend that there was a material variance between the indictment (which charged a single conspiracy) and the proof at trial (which appellants claim showed multiple conspiracies). All appellants except Cardona contend that the court failed to properly charge

* The counts found defective in *Berlin* failed to use any language fairly importing knowledge (the words used, "counselled and caused", were taken from 18 U.S.C. § 2), whereas in the case at bar the counts use the word "knowingly". Indeed, one of the statutes involved in *Berlin* uses the same form of language used in the counts herein. 18 U.S.C. § 1014 states in pertinent part—"whoever knowingly makes any false statement. . . ." Appellants' reliance on this case is clearly misplaced.

** In response to Points VI, VIII(a), IX and X of Bernsteins' brief, Point II(C) of Behar's brief, and Point I of Cardona's brief.

the jury on the single conspiracy issue.* Appellants Harry Bernstein, Rose Bernstein and Eastern Service Corporation also contend that joinder was improper and that the denial of severance motions was error.

(1)

The conspiracy count of the indictment charged a single conspiracy having two objects: (1) the submission of applications to the FHA containing false statements for the purpose of influencing the FHA to issue mortgage insurance (in violation of 18 U.S.C. § 1010); and (2) bribery of FHA officials, with intent to influence their official actions (in violation of 18 U.S.C. § 201).

Although a claim is made that these two objects were unrelated and hence cannot be part of one conspiracy,** the chief claim in this regard appears to be that there were two separate conspiracies: one conspiracy which involved properties of Mrs. Kapraki (hereinafter "Kapraki properties") and a second conspiracy which involved properties in which Jet Warehouse, Inc., wholly owned by Harry Bernstein, had a financial interest either as owner or second mortgagee (hereinafter "Jet properties").*** The claim is

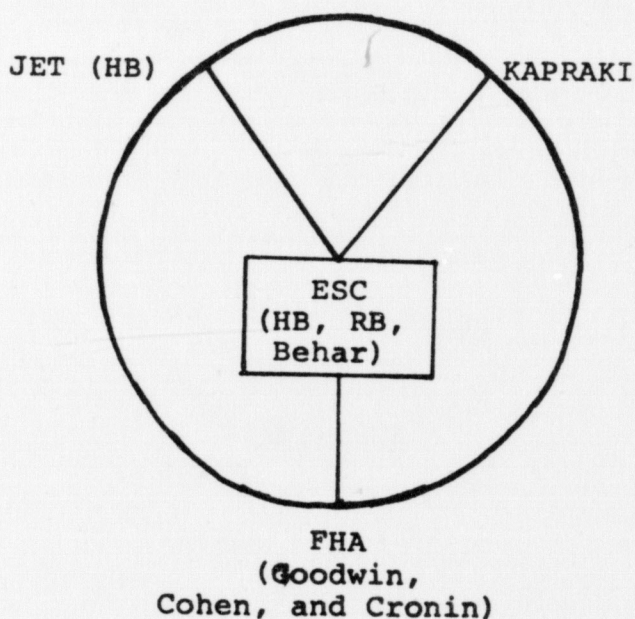
* Since this claim as to the court's charge is closely related to the other issues discussed under this point, it will be discussed here rather than with the portion of this brief relating to the court's charge.

** Since the two objects were clearly related and only appellant Cardona was not involved in both objects of the conspiracy, this claim will be discussed in detail in connection with Cardona's claim herein.

*** Counts 2 through 38 of the redacted indictment, alleged as overt acts of the conspiracy count, involve Kapraki properties. These overt acts involve both the submission of false statements (§ 1010) and bribery (§ 201). Counts 39 through 65 of the redacted indictment, alleged as overt acts of the conspiracy, involve Jet properties. These overt acts involve bribery (§ 201) and overvaluation (§ 1010).

made that the criminal activity with respect to the Kapraki properties "bore no relation" to the criminal activity with respect to the Jet properties.

However, the summary of the evidence contained in the statement of facts herein shows that this claim is simply not accurate. It is submitted that the following diagram accurately portrays the connection between the Jet and Kapraki properties.



Thus, as depicted in the diagram, the Jet and Kapraki properties were tied together as part of one overall scheme not just through the actions of Eastern Service Corporation (Harry Bernstein), but also through the actions of the FHA officials involved in the conspiracy. As a result of their relationship with the Bernsteins, Cronin and Cohen improperly assigned appraisals to Goodwin with respect to both Jet and Kapraki properties. Further, as a result of his relationship with these central figures, Goodwin corruptly performed official acts with respect to both Jet and Kapraki properties, and received bribes in connection with these appraisals directly from both Jet (Harry Bernstein) and Kapraki. Thus both Eastern Service Corporation (Harry Bernstein) and the FHA employees involved in the conspiracy performed their functions throughout the scope of the conspiracy charged regardless of whether the properties were those of Jet or Kapraki. Hence the connecting links and common design necessary to establish one conspiracy are present in this case. Surely there was more than sufficient evidence for the jury to find that a single conspiracy was proven. It is perhaps significant that appellants, in arguing that there were multiple conspiracies, have totally ignored the critical role played by the improper assignment of appraisals herein. Moreover, they have glossed over the role played by Goodwin as to both sets of properties, based on his relationship with the central figures. Surely these FHA officials acted in furtherance of what they thought was one conspiracy.

In support of their argument, appellants rely heavily on *Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239 (1946). That case also involved the submission of applications for mortgage insurance to the FHA. There were eight or more separate independent groups with one common and key figure in all of the transactions. None of the groups had any connection with each other, though they all dealt with the central figure. The pattern was that of separate spokes meeting at a common center, but without the rim

of the wheel to connect the spokes together in one conspiracy. Therefore, there was a variance between the charge of one conspiracy and the proof of eight or more conspiracies.* However, as noted above, in the case at bar there was a connecting link—the rim of the wheel, so to speak—in the form of the activities of the FHA officials involved in the conspiracy. These interrelationships provide a more than adequate basis for finding one conspiracy. *Blumenthal v. United States*, 332 U.S. 539, 558, 68 S. Ct. 248, 257 (1947) (distinguishing the *Kotteakos* case);** *United States v. Tramunti*, *supra*, slip op. at 2136-2138 (finding a single conspiracy involving two spheres of operation based on

* It might be noted that in the series of 13 indictments involving the Bernsteins and Eastern Service Corporation (72 Cr. 587-599) the government corrected the very deficiency raised in the *Kotteakos* case. The government determined in good faith that there were twelve separate conspiracies all involving the Bernsteins and, accordingly, charged the twelve separate conspiracies in twelve separate indictments (the 13th indictment, 72 Cr. 589, involved one substantive count and no conspiracy count).

** Indeed, this is a much stronger case than *Blumenthal* for finding a single conspiracy. In that case the three selling intermediaries (Blumenthal, Feigenbaum, and Abel) who dealt with the central figures (Francisco Distributing Company, Goldman, and Weiss) did not even know the existence of the real owner of the whiskey, and were not all linked together except by the awareness of each that there had to be other salesmen paralleling their efforts. In this case, Kapraki and Jet (Harry Bernstein) both knew Goodwin and were linked together not only by their awareness that others beside themselves had made arrangements with Eastern Service Corporation to have appraisers improperly assigned to them, but also by the fact that each bribed Goodwin as part of the common scheme. That Kapraki may have entered the scheme substantially after it was initially formed is of no moment. As the Court in *Blumenthal* noted (332 U.S. at 556, 68 S. Ct. at 256): "conspiracies involving such elaborate arrangements generally are not born full grown. Rather they mature by successive stages which are necessary to bring in the essential parties."

evidence of interrelationships between the two spheres). See also *United States v. Hutul*, 416 F.2d 607, 619 (7th Cir. 1969), *cert. denied*, 396 U.S. 1007 (1970).

(2)

Appellant Behar further contends, even assuming the evidence established a single conspiracy, that there was insufficient evidence that she was aware that the scope of the conspiracy was broader than her individual participation. Appellant points out that "in essence, the conduct of the defendant Behar, as established at the instant trial, whether guilty or not, related solely to the applications of Mrs. Kapraki" (brief, p. 44). Appellant further argues that even as to the Kapraki properties, Behar had no knowledge of the criminal activities of D & B, the Kapraki — Cardona scheme, or Rose Cohen.* Appellant concludes that her conspiracy conviction cannot stand under the single act doctrine reasserted by this Court in *United States v. Sperling*, *supra*, 506 F.2d at 1342.**

* The evidence and the convictions on the substantive false statement counts belies this claim as to her awareness of the activities by D & B and Kapraki-Cardona. Moreover, the evidence was sufficient for the jury to find that she was specifically aware of the identity and role of Rose Cohen (see, e.g., R. 10686, 10695-696). In any event Behar clearly was aware that the Bernsteins had some illicit arrangements for having Goodwin assigned to selected Kapraki properties; this is sufficient.

** This appellant also points to the language in *Sperling* (506 F.2d at 1340-41) wherein this Court cautioned the government that it might be "unnecessarily exposing itself to reversal by continuing" to charge a single conspiracy when "the criminal acts could be more reasonably regarded as two or more conspiracies perhaps with a link at the top". Putting aside the fact that the government had not received that warning when the instant indictment was brought or even when the trial was held, as pointed out above there was much more interrelationship here than a link at the center; accordingly, it would be simply unrealistic to state that the evidence is more reasonably interpreted as showing two or more conspiracies.

First of all, it is hornbook law that all members of a conspiracy need not know each other; it is sufficient if each knows that the conspiracy has a scope whose success requires an organization wider than may be disclosed by his personal participation. See, e.g., *United States v. Edwards*, 366 F.2d 853, 867 (2d Cir. 1966), *cert. denied*, 386 U.S. 908 (1967). More importantly, unlike the defendants in *Sperling* who raised the single act claim now made, Behar not only was involved in many more acts than a single one, but also her connection was at the center of the conspiracy and not at the extreme link of one end of a chain conspiracy. Suffice it to point out that Behar was convicted on 18 false statement and 3 bribery counts. Further, she played an active role in bringing Kapraki into the bribery phase of the conspiracy. The evidence is clear that at the time she brought Kapraki to the Bernsteins in order to get "the right appraiser" for the Kapraki properties, she was aware that the Bernsteins had previously made similar arrangements with respect to non-Kapraki properties. Since she was aware that the criminal scheme was broader than her participation as an individual and included non-Kapraki properties, it is immaterial whether she was specifically aware that it included Jet properties. Her claim in this regard is frivolous.*

(3)

Appellant Cardona's basic claim as to the conspiracy charge is somewhat different. He points out that the conspiracy as charged had multiple objects, and that there was no evidence connecting him with the bribery-overvaluation aspect of the conspiracy. Cardona argues that for there to be a single conspiracy where the scope of the scheme

* The lack of any substance whatsoever to Behar's claim is clearly seen when her claim is compared with that of Kurshenoff's and Andriotis' in *United States v. LaVecchia*, — F.2d — (2d Cir. April 4, 1975, slip op. 2741, 2756-2757), which latter claims were rejected.

is broader than a particular individual's participation, there must be a common goal and knowledge of its essential features. He contends that there was no proof of a common goal and no claim by the government that Cardona had any knowledge of the bribery—overvaluation aspect of the conspiracy.

The first part of his contention is frivolous. There was ample evidence of a common goal by all the conspirators. That ultimate goal of the criminal scheme was to thwart the lawful operation of the FHA loan guaranty program in obtaining FHA insurance on the mortgages. Insofar as is material here, that ultimate goal was clearly shared by Harry Bernstein, Rose Bernstein, Eastern Service Corporation, Florence Behar, Melvin Cardona, Ortrud Kapraki, Edward Goodwin, and the other conspirators whose involvement was brought out at trial. If that goal was accomplished, each conspirator in his own way and by his own role stood to make money. Two factors were critical in order for a transaction to proceed to a closing. First, it was necessary to secure a high enough value in the FHA appraisal of the property to satisfy the needs of those who had a financial interest in the property (whether it be Kapraki or Jet). Second, it was necessary to develop sufficient income on the part of the mortgage applicant to obtain FHA approval. In order to accomplish the first of these two factors, the bribery object of the conspiracy emerged — arranging for the “right appraiser” to be assigned to selected cases and to be bribed for the purpose of obtaining a high FHA value on the property. In order to accomplish the second factor, the false statement object of the conspiracy emerged—the submission of false statements concerning employment and/or income of the mortgage applicants. Thus there were two basic types of crimes (bribery and submission of false statements) committed in

furtherance of the common goal of the single conspiracy.* See *United States v. Lerinson*, 405 F.2d 971, 989 (6th Cir. 1968), *cert. denied*, 395 U.S. 958 (1969) (the court found a single conspiracy aimed at thwarting the lawful operation of the VA home loan guaranty program; the conspiracy had two objects—(1) to defraud the U.S. by avoiding the requirement that the supervised lender exercise its independent judgment as to the qualifications of the loan, and (2) to submit false statements in the loan applications). See also *United States v. Kelly*, 349 F.2d 720, 755-56 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966) (single stock distribution conspiracy having two interdependent stages); *United States v. Benjamin*, 328 F.2d 854, 864 (2d Cir.), *cert. denied*, 377 U.S. 953 (1964) (two aspects of single scheme—to sell unregistered securities and to defraud in sale of securities; *Kotteakos* inapplicable to an “integrated financial fraud”); *United States v. Crosby*, 294 F.2d 928, 944-45 (2d Cir. 1961), *cert. denied*, 368 U.S. 984 (1962) (integrated single conspiracy with many criminal ventures of varying types).

The government concedes, as it did throughout the trial, that the second part of Cardona's contention is accurate—there was no evidence in the case connecting Cardona with the bribery object of the conspiracy.** The conclusion which Cardona seeks to draw from this is the point where the government's position departs from Cardona's. This raises a critical question as follows: assuming that the evidence has established beyond a reasonable doubt a single conspiracy by some defendants having two objects, may a defendant who has actively participated in and whose scope of agreement includes one object of the conspiracy, but who is not aware of the second object of the conspiracy,

* For a discussion of the various ways in which the objects and the actions of the various conspirators related together, see the government's argument in response to the motions to dismiss the conspiracy count at the close of the government's case (R. 15,494-15,502).

** The jury was repeatedly so instructed by the court.

be charged and convicted as being a member of that single conspiracy?* While it does not appear that this question has ever been squarely presented to this Court in this exact form, its answer has been suggested by prior case law.

The leading case in this regard is *United States v. Borelli*, 336 F.2d 376, 384-387 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965). It involved a narcotics conspiracy which continued over a long period of time, included the performance of many transactions, and involved a change of membership with new parties joining the conspiracy and others terminating their relationship with the conspiracy. The Court found that the evidence was sufficient to permit a finding of a single continuing conspiracy by several of the defendants. However, as to other defendants the evidence showed that they participated in only one or more phases of the criminal enterprise. The Court held that "where the evidence is ambiguous as to the scope of the agreement made by a particular defendant and the issue has practical importance, the court must appropriately focus the jury's attention on that issue rather than allow it to decide on an all-or-nothing basis as to all defendants" (336 F.2d at 386). Since the trial court had failed to do this, the Court reversed the convictions and remanded the case for a new trial. It noted that since there was sufficient evidence of a single conspiracy as to several defendants, the direction of an acquittal or even the election on a retrial between the two phases of the conspiracy was not required. All that was required was the giving of appropriate instructions.

*The court charged the jury that it could find Cardona to be a member of the conspiracy if the scope of his agreement included one of the objects of the conspiracy, provided that the jury first found that the single conspiracy charged in the indictment existed, and that the scope of the agreement made by at least two of the conspirators included both objects of the conspiracy (C. 367-368). There was sufficient evidence for the jury to find that both objects were included in the scope of the agreement by Harry Bernstein, Rose Bernstein, Eastern Service Corporation, Florence Behar, and Ortrud Kapraki.

The situation in the case at bar is a similar one. The evidence was sufficient to establish a single conspiracy by several of the conspirators. As to Cardona, the evidence was sufficient to establish that he had joined with the other conspirators in one phase of the conspiracy—the submission of false statements. Thus, under *Borelli*, all that was required was the giving of appropriate instructions as to the scope of the agreement made by Cardona, which the trial court here gave. The court instructed the jury that in determining whether a particular defendant was a member of a conspiracy, it should consider only that defendant's acts and statements. The court further told the jury that there was no evidence in the case connecting Cardona with the bribery aspect of the conspiracy, and that it could not consider against Cardona any act or declaration in furtherance of the bribery aspect of the conspiracy. (C. 366-367, 375-377.) Thus the court appropriately focused the jury's attention on the critical issues—that the scope of Cardona's agreement must be determined individually from what was proved as to him, and his criminal liability is limited to the scope of the agreement made by him. Accordingly Cardona's conviction on the conspiracy count should be upheld. *United States v. Borelli, supra*. See *United States v. Dardi*, 330 F.2d 316, 327 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964) (single conspiracy involving (1) gaining control of certain stock, (2) market manipulation, and (3) sale of unregistered stock; not fatal that broker-appellants involved in the sale of unregistered stock were not shown to have been aware of the other parts of the unlawful plan); *United States v. Benjamin, supra*, 328 F.2d at 864 ("immaterial that the evidence may not have shown awareness by Howard of the part of the scheme that involved the sale of unregistered shares"); see also *United States v. Levinson, supra*, 405 F.2d at 989 (apparently there was no evidence connecting Strang with the object of the conspiracy involving the submission of false statements in the VA loan applications). Cf. *United States v. Papadakis*, 510 F.2d 287, 297 (2d Cir. 1975) (holding that a convic-

tion on a conspiracy count having multiple objectives will be upheld where the evidence is sufficient to show that the appellant agreed to accomplish at least one of the criminal objectives); *United States v. Arroyo*, 494 F.2d 1316, 1318-19 (2d Cir.), *cert. denied*, — U.S. —, 95 S. Ct. 46 (1974) (holding that a single conspiracy having three objects was alleged and proved; the jury rendered a special verdict finding that one appellant was associated with all three objects, three appellants with objects 1 and 2, and one appellant with object 1); *United States v. Bynum*, 485 F.2d 490, 498 (2d Cir. 1973) (planned robberies and murder not connected to some conspirators, but held to be part and parcel of single drug conspiracy).

(4)

Even assuming that there was a variance between the indictment and the government's proof, this does not end the inquiry. "Where the indictment charges one conspiracy but the proof shows more than one, a variance is not necessarily fatal. 'The true inquiry . . . is not whether there has been a variance in proof, but whether there has been such a variance as to affect the substantial rights of the accused' [omitting citations]". *United States v. Miley*, — F.2d — (2d Cir. March 19, 1975, slip op. 2363, 2390). Appellants make certain conclusory statements about the prejudice suffered and the evidentiary ramifications of the claimed variance in proof. However, as already noted, the court charged the jury that membership in a conspiracy must be determined on the evidence of the defendant's own acts and statements (C. 375-376). The court told the jury that it could not consider any act or statement in furtherance of a conspiracy against any defendant unless it first found beyond a reasonable doubt that the person doing the act or making the statement was a participant "in the same object and the same conspiracy" as the defendant (C. 377). Appellants have not pointed to any hearsay emanating from a member of one conspiracy that was used to the detriment

of a member of another. Under these circumstances any variance was not prejudicial. *United States v. Miley, supra*, slip op. at 2391;* *United States v. Cirillo*, 499 F.2d 872, 888 (2d Cir. 1974).

The only other claim of prejudice made is that there was a "spill over" effect as a result of the variance. Even this claim is not particularized. Small wonder, for "this was not a case where a minor participant in one conspiracy was forced to sit through weeks of damaging evidence relating to another." *United States v. Miley, supra*, slip op. at 2393. There was overwhelming independent evidence connecting appellants to the scheme herein. Appellants Harry Bernstein, Rose Bernstein, and Eastern Service Corporation were the central figures in the criminal scheme. Appellant Behar played a major role in both the bribery and false statement aspects of the criminal activities involving the Kapraki properties. Appellant Cardona played a major role in the false statement aspect of the criminal activities involving the Kapraki properties. The jury was amply advised of the importance of giving separate consideration to each defendant and each charge based on the defendant's own conduct (C. 332, 366-367, 375-377, 389, 586-587) (see also C. 292, 298, 301, 307, 503, 506, 509, 510, 554, 560, 566, 580). The jury carefully sifted and weighed the evidence against each appellant (see Point III, *infra*), convicting on most counts and acquitting on others. There simply is no prejudice here.**

* The instant case does not even involve the problem of the *Pinkerton* charge given in the *Miley* case. Although this case was prior to this Court's warning in *Sperling* (506 F.2d at 1341-42) about the overuse of this charge, the government recognized the problems such a charge would cause, and specifically did not request the charge herein.

** It might be noted here that those defendants who played a lesser or minor role in the criminal enterprise were severed with the consent of the government at the opening of the trial. In any

[Footnote continued on following page]

Assuming *arguendo* that whether the proof showed one or more conspiracies was a factual question for the jury, appellants Harry Bernstein, Rose Bernstein, Eastern Service Corporation, and Florence Behar further contend that the trial court failed to adequately instruct the jury that it must find a single conspiracy and not multiple conspiracies, despite a defense request to do so.* As will be shown below, this contention is without merit.

As has been previously shown, the government's evidence was more than adequate to establish a single conspiracy among several defendants, with others joining in one or more phases of it. If the jury believed the government's evidence, it is doubtful that they could have reached any other conclusion on this issue. See *United States v. Arroyo*, *supra*, 494 F.2d at 1319; *United States v. Calabro*, 449 F.2d 885, 893 (2d Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); *United States v. Kelly*, *supra*, 349 F.2d at 755-756. However, it is not necessary to determine herein whether or not it was necessary at all to instruct the jury on the issue. For the court did give instructions in this regard.

The trial court explained in detail the essential elements of the crime of conspiracy, focused the jury's attention in compliance with *Borelli* on the importance of the jury determining whether each defendant became a member of the conspiracy and the scope of each defendant's agreement, and instructed that the jury may find all, none, or

event "the spillover claim here is not compelling and did not approach the danger of transference of guilt found persuasive" in the *Kotteakos* case. *United States v. LaVecchia*, *supra*, slip op. at 2758 (concurring opinion).

* Of the five appellants, only Rose Bernstein specifically requested the court to submit to the jury as a question of fact whether the government had proven a single conspiracy or two separate conspiracies, and this was only after the court had completed its initial charge (C. 685).

some of the defendants guilty or not guilty on the conspiracy count (C. 356-390). The trial judge further instructed the jury that count one of the indictment "charges a single conspiracy having two objects or goals, and the burden is upon the government to prove that charge as it's made beyond a reasonable doubt" (C. 363-364); that the count charges a single conspiracy with two objects or goals (defining the two objects), and the government must establish beyond a reasonable doubt that the "conspiracy described in the indictment" was wilfully formed and existing at or about the time alleged (C. 364); in discussing membership in the conspiracy, the court again stressed that the jury must first find that the single conspiracy charged in the indictment existed (C. 367); and in discussing the overt act element of the conspiracy, the court again reminded the jury that to convict it must find beyond a reasonable doubt that the single conspiracy having two objects as charged in the indictment had been proved (C. 384). Under these circumstances the court made it crystal clear that the jury could not convict unless it found the single conspiracy charged in the indictment. There is simply no basis for believing that the jury thought it could convict if it found multiple conspiracies, and there was no error in the charge. *United States v. Tramunti*, *supra*, slip op. at 2141; *United States v. Sisca*, 503 F.2d 1337, 1345 (2d Cir.), *cert. denied*, — U.S. — 95 S. Ct. 328 (1974); *United States v. Calabro*, *supra*, 449 F.2d at 893-894; *United States v. Aiken*, 373 F.2d 294, 299 (2d Cir.), *cert. denied*, 389 U.S. 833 (1967); *United States v. Borelli*, *supra*.

Moreover, appellants fail to point out how they were prejudiced by the charge.* Under the circumstances herein,

* As noted earlier, only appellant Rose Bernstein made a request in this regard, and this was made after the court's initial charge (C. 685). If it was so important to the defense to have such a charge, "that request would probably have been made in writing and not orally, almost as an afterthought." *United States v. Coughlin*, — F.2d — (2d Cir. April 15, 1975, slip op. 2895, at 2902) (re alibi charge).

as this Court noted in *Tramunti*, a charge that there must be an acquittal if the government has proven multiple conspiracies is inappropriate. For it fails to take into account the "very real possibility" that one of the conspiracies proven was the single one charged in the indictment; "where there was proof of the single, overall conspiracy, the fact that there also was evidence adduced of other conspiracies or that the jury could have found two major conspiracies does not require a mandatory charge of acquittal" (slip op. at 2140-41). The primary concern reflected by the issue of multiple conspiracies is to limit the liability of a defendant to the scope of his agreement and to prevent the transfer of guilt from a member of one conspiracy to a member of a second conspiracy based on an act or declaration committed in furtherance of the first conspiracy. The charge requested by the government and given by the court in this regard was adapted from *Borelli* and from the suggested instructions concerning multiple conspiracies in *Devitt and Blackmar, Federal Jury Practice and Instructions*, §§ 29.14, 29.15 (1970). It did so limit a defendant's liability, and further prohibited such a transfer of guilt not only from one object of the conspiracy to the second object, but also from one conspiracy to a second one (C. 366-368, 377). Accordingly, there was no prejudice suffered by appellants, and the convictions on the conspiracy count should be upheld. See *United States v. Aiken, supra*, 373 F.2d at 299; *United States v. Borelli, supra*.

(6)

Appellants Harry Bernstein, Rose Bernstein, and Eastern Service Corporation contend that their convictions on the bribery counts should be reversed on the grounds of impermissible joinder and erroneous denial of their severance motions. The propriety of joinder in cases where there are multiple defendants is governed by Rule 8(b) of the Federal Rules of Criminal Procedure. It provides as follows:

Two or more defendants may be charged in the same indictment or information if they are alleged

to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Joinder of a conspiracy count and the substantive counts arising out of the conspiracy is proper, as the charge of conspiracy provides a common link and demonstrates the existence of a common plan or scheme. *Schaffer v. United States*, 362 U.S. 511, 514, 80 S. Ct. 945, 947 (1960); *United States v. Miley*, *supra*, slip op. at 2394; *Wright*, *supra*, § 144, at p. 322. Thus joinder herein was clearly proper, since all the substantive counts were alleged as overt acts in the conspiracy count.*

Where joinder is proper, and a defendant alleges that the joinder is prejudicial, Rule 14 of the Federal Rules of Criminal Procedure comes into play. It provides:

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

* Even absent the single conspiracy count, joinder is most likely proper here, since it would appear that each of the counts were part of the same series of acts or transactions. The common participants at the center and the identical schemes and transactions as to each property demonstrate a clear discernible pattern of action. See *Haggard v. United States*, 369 F.2d 968, 973-975 (8th Cir. 1966), *cert. denied*, 386 U.S. 1022 (1967). See also *United States v. Adams*, 434 F.2d 756 (2d Cir. 1970); *United States v. Scott*, 413 F.2d 932 (7th Cir. 1969), *cert. denied*, 396 U.S. 1006 (1970); *Kleven v. United States*, 240 F.2d 270 (8th Cir. 1957).

The matter is entrusted to the sound discretion of the trial court. The burden is on the defendant to make a strong showing of prejudice to justify a severance.* The test on appeal is whether or not the trial judge abused his discretion in refusing to sever. Since the evidence herein clearly supported the charge of a single conspiracy and that the appellants were members of that conspiracy, "the contention that the trial judge abused his discretion in failing to sever fails a fortiori." *United States v. Pro-jansky*, 465 F.2d 123, 138 (2d Cir.), *cert. denied*, 409 U.S. 1006 (1972) (the case involved a 3 and 1/2 month trial of a massive scheme to manipulate stock prices); see also *United States v. Sperling*, *supra*, 506 F.2d at 1342. In any event appellants were central figures in the scheme herein. As noted before, they simply have not shown any prejudice. Accordingly, absent a showing of substantial prejudice, appellants' claims as to severance are without merit.**

* Where during trial it is determined that the evidence is insufficient to establish the conspiracy, the trial court has a continuing duty at all stages of the trial to grant a severance if prejudice does appear. *Schaffer v. United States*, *supra*, 362 U.S. at 516, 80 S. Ct. at 948. However, the evidence herein was more than adequate to support the conspiracy count. Moreover, an examination of the trial proceedings at the close of the government's case and at the close of the entire case reveals that of the appellants herein, only Eastern Service Corporation then moved for a severance (R. 15506). Appellants have not pointed out the particular motion for severance the denial of which in their view constitutes an abuse of discretion.

** The comparison between appellant Rose Bernstein and the defendant Shuck in *United States v. Kelly*, *supra*, is simply preposterous. Putting aside the fact that appellant herein has not made the strong showing of prejudice which Shuck made in that case, contrary to the minor part played by Shuck therein Rose Bernstein played a major and critical role in the criminal scheme herein. Indeed, almost every major government witness who was involved in the activities brought out at the trial implicated Rose Bernstein as a central figure in the criminal scheme. These witnesses included Kapraki, the D & B employees, Fey, Goodwin, and Cohen.

United States v. Milcy, supra, slip op. at 2395; *United States v. Papadakis, supra*, 510 F.2d at 300; *United States v. Branker*, 395 F.2d 881, 887 (2d Cir. 1968), *cert. denied*, 393 U.S. 1029 (1969).*

POINT III

The claim of prosecutorial mismanagement is without any merit.**

All appellants claim that they were deprived of a fair trial by the sheer length of the trial, allegedly caused by prosecutorial mismanagement. This contention has largely been disproved by the discussion under Point II, *supra*. However, a few more comments herein are appropriate.

(1)

The courts have recognized that although long trials should generally be avoided, there are certain types of cases which necessitate delving into many transactions and assembling many pieces of evidence. As the Supreme Court said in *Kotteakos v. United States, supra*, 328 U.S. at 773, 66 S. Ct. at 1252: "There are times when of necessity, because of the nature and scope of the particular federation, large numbers of persons taking part must be tried together or perhaps not at all, at any rate as respects some. When many conspire, they invite mass trial by their conduct." In the trial of such a case, as this Court pointed out in *United States v. Dardi, supra*, 330 F.2d at 329, in rejecting a similar claim as is made herein:

Every defendant can claim and with much plausibility that his own role may have become besmirched

* Appellants' contention as to prosecutorial mismanagement has largely been disproved by the discussion under this point. However, a few more comments are appropriate in this regard, and are made in Point III, *infra*.

** In response to Point II of Bernsteins' brief, Point II (A), (D) of Behar's brief, and Point I of Cardona's brief.

by having been tried with others more guilty than he—and naturally every defendant feels that he is the least guilty, if guilty at all. . . . In any financial scheme of magnitude involving many persons and many companies it is but normal expectancy that there may be many participants. If the Government honestly believes (and there is no proof here to the contrary) that many defendants have played a part in the conspiracy they may be—and probably should be—joined as defendants. . . . If the indictment of the many original defendants contributed to the length of the trial, this fact does not constitute reversible error.

(The indictment in the *Dardi* case named thirty-three defendants and seventeen co-conspirators, and contained thirty counts; five defendants participated to the completion of the eleven-month trial.)

The key determination, therefore, is whether it is within the jury's capacity, given the complexity of the case, to follow admonitory instructions and to keep separate, collate and appraise the evidence relevant only to each defendant. See *United States v. Kahn*, 381 F.2d 824, 829 (7th Cir.), *cert. denied*, 389 U.S. 1015 (1967). In *United States v. Stromberg*, 268 F.2d 256, 264-265 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959), a trial of 19 defendants in which the indictment charged a conspiracy involving 46 defendants and 19 others, the Court also rejected a claim that appellants were denied a fair trial:

We place our holding squarely on the fact that, in the context of this trial, nothing in the issues, the evidence or the rulings warrants a conclusion that the number of defendants prevented the jury from appraising the independent evidence against each defendant and meting out individual justice under the law . . . we think it by no means a task of in-

superable difficulty for the jury to comply with the judge's instructions and determine as to each defendant the issue of membership in a single continuing conspiracy on the basis of the independent evidence—i.e., the evidence as to his own acts and statements.

See also *Capriola v. United States*, 61 F.2d 5, 11, 13 (7th Cir. 1932).

The criminal scheme headed by the Bernsteins and the actions taken to accomplish its goals were wide-ranging and involved many participants and hundreds of separate crimes. However, the dangers attendant to a mass trial were minimized. There were thirteen separate indictments (of which this was one) brought, instead of one mass indictment. Even as to the instant indictment, the number of defendants who proceeded to trial was reduced to nine, and the number of counts was reduced to sixty-five.* The indictment and thorough bill of particulars fully and fairly apprised appellants of the nature of the case against them. While it was necessary to present a substantial amount of background evidence to explain the setting of the FHA, the context in which the criminal activities took place, and to introduce evidence as to a substantial number of transactions in order to properly present the true nature and scope of the criminal scheme (see, e.g., R. 20278-20280), the critical issues of the case as submitted to the jury were relatively narrow and simple: on the bribery counts, credibility of the witnesses (mainly Kapraki, Goodwin, and Cohen); on the false statement counts, "knowledge" of the

* In *United States v. Crosby*, *supra*, 294 F.2d at 944, this Court rejected an attack on the prolixity of an indictment containing 50 counts, noting that "the indictment in this case is a rather faithful picture of the activity charged to the defendants," and refused to fault the government where the prolixity of the indictment was caused by the scope and complexity of the defendants' actions.

falsity on the part of each defendant (which in turn was dependent to a great extent on the credibility of Kapraki, Abad, the D & B employees, and Fey).

The factual contentions were thoroughly presented and highlighted to the jury in the exhaustive summations which lasted fourteen days. The credibility of the key government witnesses was vigorously assailed by the defendants. There was nothing inherently complicated in, and it certainly was not beyond the capacity of the jury to resolve, these relatively narrow factual issues.* Moreover, as noted in Points II and VIII with citations to the record, the court constantly made the jury aware of the fact that there were separate individuals on trial and that each must be judged solely on the evidence applicable to him. Finally, the court clearly and adequately advised the jury as to the essential elements of the crimes herein.**

The jury itself displayed a high degree of conscientiousness and sophistication throughout the trial and its deliberations (see, e.g., the court's comment at C. 895, and the comment of Eastern's counsel at R. 19524). The record of the proceedings indicates that the jury carefully considered the evidence against the defendants (C. 713-1009). The

* Indeed, in at least one sense the very number of transactions involved herein and the time involved to prove them served to promote a fair trial. The key government witnesses, Kapraki and Goodwin, were on the stand for a total of 19 and 16 days respectively. Thus the jury was in a better position than most juries to assess credibility; this jury in the course of the days of testimony had a full opportunity to size them up and weigh their credibility. Just as in everyday life, the longer you know someone, the better you are able to assess him. Of course, since the witnesses testified truthfully, this worked to the disadvantage of appellants, even though it promoted a fairer trial.

** This Court has recognized the importance of the trial court handling a voluminous trial in a competent manner. See *United States v. Sperling*, *supra*, 506 F.2d at 1341, n. 26.

jury asked for the relevant exhibits (C. 732-735, 750-753, 756, 904, 917, 920, 951). It asked for various parts of the charge to be read back to it (C. 715, 721). It asked for files, the reading of testimony, and the charge regarding *particular* counts and *particular* defendants (C. 735, 750, 782, 824-825, 840, 844, 847-848, 862-863, 873, 897-899, 937-938, 949), thus evidencing that it focused on each count and each defendant separately. The jury deliberated for seven days before returning its verdict against appellants herein. Seven more days of deliberation took place before the jury was discharged. The verdict itself evidenced the careful, individual consideration which the jury gave herein. The jury acquitted one defendant and was not able to reach a unanimous verdict as to three other defendants. It is probably of no little significance that these four defendants whom the jury did not convict were not the central figures in the criminal scheme, and the evidence against them was not as strong as against appellants herein. As to these appellants, the jury acquitted on some counts, and convicted on most of the counts, again evidencing a careful consideration of the evidence. See *United States v. Papadakis*, *supra*, 510 F.2d at 300-301; *United States v. Berlin*, *supra*, 472 F.2d at 1008; *United States v. Hutul*, *supra*, 416 F.2d at 620.

Under all the circumstances of this case appellants herein received a fair trial.* See the cases cited earlier

* Appellant Behar further argues that her Sixth Amendment right to a speedy trial was violated by the eighteen-month pre-trial period and by the unnecessarily extended trial in this case. While appellant cites no authority for her suggestion that the period of trial should be included in this constitutional right, it makes no difference herein. The length of time covered by the pre-trial proceedings and the trial itself is not undue considering the nature and circumstances of the case. Moreover, the reasons for the delay were valid, including the making of and ruling on pre-trial motions, the furnishing of discovery and the bill of parti-

[Footnote continued on following page]

under this point, and *United States v. Alai*, 511 F.2d 585, 602-603 (2d Cir. 1975).

POINT IV

The district court's conduct was proper and did not deprive appellant Cardona of a fair trial.*

Few trials have been as vigorously contested by opposing counsel over such a prolonged period of time as the trial to which these appeals are addressed. The district court presided over trial proceedings which lasted more than nine months, and which consisted of approximately 150 court days and approximately 25,000 pages of trial transcript. The court's task during these proceedings was a most difficult one, and was performed in a competent manner. However, appellant Cardona argues that the district court's conduct during the course of the trial deprived him of a fair trial.

To substantiate this allegation, appellant directs this Court's attention to a portion of the direct examination of Cecilia Cardona, wife of appellant. The witness is testifying about events which took place after the FBI had com-

culars, and time for defendants to prepare for trial based on this material. Finally, appellant was free on bail and has not made any showing, let alone a particularized one, of prejudice to her defense. Accordingly, appellant's claim in this regard is without any merit under the balancing test set forth in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192 (1972).

Appellant also makes reference to the prompt disposition rules, but does not appear to contend that the government was not ready for trial within the meaning of those rules. Appellant has not herein attacked the findings made by the district court in this regard, which excluded certain periods of time under Rule 5(a), (h). The court denied speedy trial motions by appellants herein (A. 573-576). Appellants' mandamus application concerning this order was denied by this Court on April 27, 1973 (D. 55).

* In response to Point IV of Cardona's brief.

menced its investigation in this case. Reference is made to the fact that in August 1971 Cardona had met at his home with an agent of the FBI, James Sniegocki (D. 78-79). Later that day Kapraki came over to Cardona's house in response to a call from Cardona. The court then asked a few questions to clarify whether appellant had called Kapraki, and what day it was that the appellant had called and met with Kapraki (D. 90-91). The witness then began to relate the substance of the conversation between Kapraki and Cardona on that day. Cardona told Kapraki that he had met with the FBI agent, and told Kapraki that if she had done anything wrong to confess to the FBI. Kapraki said she would think about it (D. 92-93). Then the following occurred at the trial (D. 93-98):

Q. What, if anything else happened during that conversation? A. My husband keep asking her to please to talk to the FBI and to do it without her lawyer and they kept——

The Court: To do it, what?

The Witness: Without her lawyer.

The Court: Whose lawyer?

The Witness: Kapraki's lawyer.

The Court: In other words, your husband was telling her what to do without his lawyer?

The Witness: Without her lawyer.

The Court: Without her lawyer?

The Witness: *According to the conversation that my husband had with Agent Sniegocki.*

The Court: *He wanted Mrs. Kapraki to tell Agent Sniegocki what your husband told Sniegocki, is that what you mean?*

The Witness: Excuse me?

The Court: Did you say you heard your husband say something to Mrs. Kapraki——

The Witness: Yes, your Honor.

The Court: You tell me again, in your own words, what exactly your husband said to Mrs. Kapraki.

I want to hear it in your own words.

The Witness: All right.

The Court: Exactly, and speak up loud because I want everybody to hear.

The Witness: My husband asked Ortrud Kapraki, in his own words he said, 'Please, Ortrud, if you have done something wrong, it's better that you talk to the FBI by yourself, because this way you will feel better.'

The Court: What about the lawyer, when did that come in?

You said something about a lawyer.

The Witness: Then my husband said to her, 'And please do it without your lawyer.'

The Court: Then you said something in accordance with——

The Witness: Because——

The Court: Did you say that?

The Witness: Yes.

The Court: *Your husband said, 'In accordance with my conversation (sic).'*

The Witness: You want me to repeat it?

The Court: Yes.

The Witness: Yes, you want me to repeat the conversation with my husband, with Sniegocki——

The Court: You are talking about the conversation and I want to hear the whole conversation, not only parts of it.

The Witness: All right.

When Agent Sniegocki left that afternoon my house——

The Court: I'm only interested right now in the conversation between Mrs. Kapraki, your husband and you in your living room or parlor, as you call it.

The Witness: Yes.

The Court: That afternoon, Sniegocki wasn't there, was he?

The Witness: In the evening, no.

The Court: No? All right.

Now that is the conversation you are talking about?

The Witness: Yes, your Honor.

The Court: All right.

Now tell us exactly what your husband said.

The Witness: All right.

He—he said to Ortrud Kapraki that it was better for her—It was—It was better for her to confess to the FBI without her lawyer.

The Court: Without her lawyer?

The Witness: Yes.

The Court: What else?

* * * * *

The Court: *You said earlier something about, He told her something about the FBI, something in accordance with the way I talked to him, what did you mean by that?*

The Witness: *According to what the Agent Sniegocki asked to my husband.*

The Court: No, no. . .

Mr. Klein: I submit, your Honor, that is an answer.

The Witness, Yes, your Honor.

The Court: Say that again.

The Witness: *According to what Agent Sniegocki have asked from my husband.*

The Court: *That is what your husband told her?*

The Witness: Yes.

The Court: You may proceed, Mr. Klein.

Mr. Klein: May I proceed?

The Court: Yes.

(Emphasis supplied.)

Appellant characterizes the district court's questioning of the witness as "being wholly unfair and even vicious cross-examination". Appellant contends that he was prejudiced, in that the questioning indicated the trial court's disbelief of the witness' testimony, and in that it was an attempt to get the witness to say that her husband told Kapraki to tell the FBI a story consistent with his statement to the FBI. However, any fair reading of the record simply does not support this claim. In analyzing this portion of the record, one should be careful that the perspective of the trial as it actually occurred is not lost in the cold black and white of a printed record. Throughout the testimony of this witness, audibility and comprehension of her words was made difficult by her soft voice, her tendency to speak rapidly, her accent, and a language barrier (see, e.g., D. 58, 60, 68-69).^{*} Under these circumstances the court's responsibility to clarify testimony and to insure that the facts are presented to the jury in a clear manner surely comes into play. Further, the problem was enhanced by the fact that there were two conversations involved—Cardona's conversation with the

^{*} This surely explains the court's questions after the witness stated Cardona told Kapraki "to talk to the FBI and to do it without her lawyer. . . ." The court's questions at this point make it evident that it was merely seeking clarification when it either misunderstood or did not hear the witness clearly (D. 93):

The Court: To do it, what?

The Witness: Without her lawyer.

The Court: Whose lawyer?

The Witness: Kapraki's lawyer.

The Court: In other words, your husband was telling her what to do without his lawyer?

The Witness: Without her lawyer.

The Court: Without her lawyer?

Appellant's characterization of this exchange as an attempt to badger the witness into saying that her husband told Kapraki to see the FBI without his lawyer is devoid of any support in the record. Moreover, there was absolutely no significance in *which* lawyer the witness was referring to.

FBI agent, and Cardona's subsequent conversation with Kapraki in which he referred to the former conversation.

In testifying about Cardona telling Kapraki to talk to the FBI, the witness stated: "According to the conversation that my husband had with Agent Sniegocki" (D. 93). This statement by the witness was at the very least unclear, and was susceptible to a number of interpretations. One interpretation is that Cardona did indeed tell Kapraki to tell the FBI a story consistent with what he told the FBI—to give a statement "according to the conversation that my husband had with Agent Sniegocki." There are other possible interpretations. Surely the testimony needed to be clarified. The court immediately attempted to do this (D. 93-98):

The Court: He wanted Mrs. Kapraki to tell Agent Sniegocki what your husband told Sniegocki, is that what you mean?

The Witness: Excuse me?

The Court: Did you say you heard your husband say something to Mrs. Kapraki— —

The Witness: Yes, your Honor.

The Court: You tell me again, in your own words, what exactly your husband said to Mrs. Kapraki. I want to hear it in your own words.

* * * * *

The Court: Then you said something in accordance with——

The Witness: Because——

The Court: Did you say that?

The Witness: Yes.

The Court: Your husband said, 'In accordance with my conversation (sic)'.

The Witness: You want me to repeat it?

The Court: Yes.

The Witness: Yes, you want me to repeat the conversation with my husband, with Sniegocki——

* * * * *

The Court: I'm only interested right now in the conversation between Mrs. Kapraki, your husband and you in your living room or parlor, as you call it.

* * * * *

The Court: You said earlier something about, He told her something about the FBI, something in accordance with the way I talked to him, what did you mean by that ?

The Witness: According to what the Agent Sniegocki asked to my husband.

The Court: No, no.[*]

* * * * *

The Witness: According to what Agent Sniegocki have asked from my husband.

The Court: That is what your husband told her?

The Witness: Yes.

Cardona's trial counsel also apparently thought that the conversation needed clarification. After the exchange between the court and the witness, he stated that the testimony was "muddled" and that he wanted to "clarify" it; he was permitted to go over the entire conversation again (D. 99).**

There was no purpose in the judge's questioning of the witness other than that of clarification (D. 125). The district court is more than a mere umpire or moderator. He has the duty of eliciting facts he deems necessary to clearly present the issues to the jury, and assist them in

* It is apparent that the court meant (in saying "no, no") that he did not want the conversation with Sniegocki, but the conversation with Kapraki.

** The confusion as to the meaning of this conversation was never really rectified, as is evident during the exchange which took place between the court, government counsel, and counsel for Arthur Prescott, at a side bar upon the completion of Mrs. Cardona's testimony (D. 123-125).

understanding the evidence.* The court's questioning was an attempt to resolve possible confusion as to the meaning of the witness' statement, and in no way was meant to imply, as appellant urges, that the judge did not believe what the witness was saying or to inject doubt or uncertainty as to the witness' credibility.** See *United States v. Weiss*, *supra*, 491 F.2d at 469; *United States v. Sclafani*, 487 F.2d 245, 256 (2d Cir.), *cert. denied*, 414 U.S. 1023 (1973).

Further, appellant's allegation of misconduct is not substantiated by any showing of prejudice. Trial counsel, through Mrs. Cardona, was permitted to bring forth testimony establishing partial alibis as to the whereabouts of appellant Cardona on certain of the days which Mrs. Kapraki had testified that appellant was with her (D. 67-77, 110-117). There is no claim that the court in any way interfered with this crucial line of questioning. At no time did the court in any way indicate to the jury that he did not believe the witness.

Moreover, the district court carefully admonished the jury throughout the trial and again during his charge (C. 319-320) that the purpose for his asking questions was to fulfill his responsibility to assist the jury in understanding the evidence by clarifying testimony, and that it was not to be taken by them as an indication of partisanship or

* It might be noted that the court at various times admonished Mrs. Kapraki during her testimony about unresponsive answers to questions on cross-examination (see, eg., R. 6380). Appellant's trial counsel also admitted that the court's questioning of Kapraki brought out information favorable to Cardona (R. 15797).

** Appellant also refers in passing to other instances of alleged misconduct by the trial court (see p. 36 of appellant's brief). However, an examination of this part of the record (R. 5205-5213, 5443-5444, 6061-6062, 6325, 6380, 5501) reveals that this claim is utterly devoid of any merit.

belief or disbelief on his part. These strong statements by the district court mitigated any possible prejudice that appellant might have suffered by the district court's examination of this or any other witness. *United States v. Cruz*, 455 F.2d 184, 185 (2d Cir.), *cert. denied*, 406 U.S. 918 (1972).

As this Court observed in *United States v. Nazzaro*, 472 F.2d 302, 304 (2d Cir. 1973), "(a) claim of unfair judicial conduct . . . requires a close scrutiny of each tile in the mosaic of the trial". The testimony of Mrs. Cardona covered approximately 69 pages in a trial transcript of over 24,000 pages. The portion objected to covered approximately ten pages. In this context the claim takes on an "aura of unreality." *United States v. Miley*, *supra*, slip op. at 2386.

In a futile attempt to substantiate his claim of misconduct in this regard, appellant refers this Court to an unfortunate exchange between the district court and trial counsel for Rose Bernstein, which took place at the side bar albeit some of it may have been overheard by the jury (D. 118-123).^{*} The court quite properly labeled this attorney's charge concerning the court's facial expressions during questioning of defense witnesses and his characterization of the court's questioning of Mrs. Cardona as "complete fantasies" of counsel's own mind. It should be noted that this attorney mounted a massive attack upon the conduct of the court throughout the trial. A reading of the record leaves one with the unmistakable impression that

^{*} In its charge (C. 291) the court said to the jury: "please don't take out on any party on either side, or any individual party, anything that may have stemmed from or resulted from any cross words that may have passed between the Court and any particular lawyer. That's between the lawyer and the Court, it has nothing to do with anything, it's not evidence. . . ." See *United States v. Boatner*, 478 F.2d 737, 741-42 (2d Cir.), *cert. denied*, 414 U.S. 848 (1973).

he was engaged in a course of conduct throughout the trial to goad the district court into error. See *United States v. McCarthy*, 473 F.2d 300, 307-308 (2d Cir. 1972). The statements by trial counsel for Rose Bernstein at side bar are examples of his attempts during trial to distort, for the purpose of attempting to create a record, the events at trial.* Indeed, it is surely significant that trial counsel for Cardona *did not* join in this attorney's baseless attack on the district court or his characterization of the court's questioning. In any event the remarks of this Court in *United States v. Kelly*, *supra*, 349 F.2d at 761, with the substitution of the name of a defendant herein, are perhaps appropriate:

Vitriolic attacks upon the fairness and impartiality of the trial judge seem to have become commonplace in these criminal conspiracy cases. . . . In this case not a single one of the claims of misconduct by the trial judge finds a shred of justification in the record. To make matters worse we find repeated instances of impertinence, churlishness, discourtesy and lack of respect for the dignity of the court, principally by counsel for [Rose Bernstein], that we cannot permit to pass without comment. It is bad enough when counsel for a defendant with a weak case turns his guns on the prosecutor, similar unfounded action against the judge presiding over the trial is not to be tolerated.

* The record is replete with examples of the antics of trial counsel for Rose Bernstein. It suffices to point out a couple of illustrative instances: (1) his wholly uncalled for remark in response to a gesture on the part of a witness into an occasion for an "inappropriate joke" (R. 11862), all this in front of the jury; (2) his baseless claim in summation that the prosecutors suborned perjury (R. 19407-408, 19456-458, 20278-280, 20610-616); and (3) his self-professed statement that he does not have to have a good faith basis for questions he asks on cross-examination (R. 13284). Perhaps this gives some indication as to whether or not his attack on the trial court was made in good faith.

POINT V

The evidence was sufficient to establish appellants' guilt beyond a reasonable doubt.*

Appellant Eastern Service Corporation contends that there was insufficient evidence to establish the intent to benefit the corporation required to support its conviction on the substantive counts charging bribery on Jet properties and aiding and abetting bribery on Kapraki properties. Appellant Rose Bernstein contends that there was a failure of proof to support her conviction of aiding and abetting Kapraki's payment of bribes to Goodwin. Appellant Behar contends that there was insufficient evidence to establish the element of knowledge required to support her conviction on the substantive false statement counts. Appellant Cardona contends that his convictions were based entirely on the testimony of accomplices, and asks this Court to reconsider its prior holdings that a conviction may rest upon the uncorroborated testimony of accomplices.

(1)

Counts 35, 36, 37 and 38 of the redacted indictment are the substantive bribery counts involving Kapraki properties on which one or more of the appellants were convicted. On each of these four properties Kapraki directly paid a bribe of \$100 to Goodwin.** It was the government's theory that Harry Bernstein, Rose Bernstein, Florence Behar and Eastern Service Corporation aided and abetted the bribery by arranging to have Goodwin assigned to appraise these properties and by counseling Kapraki to pay Goodwin (see government's summation, R. 20,540-20,624).

* In response to Points V, IX and X of Bernsteins' brief, Point IV of Behar's brief, and Point III of Cardona's brief.

** Counts 29-30 and 33-34 involved two Kapraki properties in which appellants allegedly aided and abetted a payment of a bribe by Kapraki to Joseph Jankowitz. All defendants were acquitted on these counts.

The contention of Rose Bernstein that there was a failure of proof on these four counts is frivolous and does not warrant discussion. The summary of the evidence as set forth in the statement of facts herein amply refutes this contention. The testimony of Kapraki establishes that Rose Bernstein (as well as Harry Bernstein and Florence Behar) counseled Kapraki to bribe Goodwin on these properties. Moreover, the testimony of Kapraki, Goodwin, Cohen, and Fey amply establishes the method used by the Bernsteins to arrange for Goodwin to be assigned to appraise these properties.

Appellant Eastern Service Corporation contends that these bribes were *solely* for the benefit of Mrs. Kapraki, and thus there was no intent to benefit the corporation. This contention displays a fundamental misconception of the nature of the business. Eastern Service Corporation was in a very competitive business. The activities of Harry Bernstein, Rose Bernstein, and Florence Behar in aiding and abetting Kapraki's bribes were performed with the purpose of providing a service to Kapraki—providing an appraiser who will give a good value on the property for the payment of a bribe. Their intent was to encourage Kapraki to process her applications through Eastern Service Corporation rather than another approved mortgagee. Kapraki did a volume business, and volume was the key to success in this industry. The Bernsteins and Behar wanted her business for Eastern Service Corporation (see the government's summation in this regard, R. 20,575-20,599). Clearly there was an intent to benefit Eastern Service Corporation.

(2)

The evidence showed that Harry Bernstein had a direct financial interest in various properties. Bernstein directly paid a bribe to Goodwin on these properties. Appellants Harry Bernstein and Eastern Service Corporation were

each convicted of bribery on 14 counts involving these properties. On these "Jet" properties, the liability of Eastern Service Corporation was based solely on the actions of Harry Bernstein.* Appellant Eastern Service Corporation contends that the intent of Harry Bernstein in paying these bribes was *solely* to benefit Jet (and thus himself).

Clearly Bernstein did have some intent to benefit Jet in paying these bribes. For the higher value placed on the properties as a result of the bribes meant that Jet would receive that much more money when the property was refinanced or sold with a mortgage insured by the FHA. However, this does not end the inquiry. If Bernstein performed this act with some intent to benefit Jet and also with some intent to benefit Eastern Service Corporation, then Eastern Service Corporation may be held responsible for that criminal act. *Standard Oil Company of Texas v. United States*, 307 F.2d 120, 128, n. 14 (5th Cir. 1962); C. 370-372.

Appellant contends that Bernstein's transactions as to the Jet properties had nothing to do with Eastern Service Corporation, and that the corporation could receive no benefit from the payment of these bribes. This argument pointedly overlooks some of the facts in the case, and is refuted by the summary of the evidence contained in the statement of facts herein. As to these transactions, Bernstein wore two hats—he was the owner of Eastern Service Corporation and Jet Warehouse, Inc. Both stood to benefit

* As appellant notes, Goodwin testified that Bernstein said he had a financial interest in these properties—referring to them variously as "mine", "ORE" (our real estate), or a "Jet" (Jet Warehouse, Inc., wholly owned by Harry Bernstein). As to 12 of these properties, the government proved directly the nature of that financial interest—Jet was the owner of three of the properties and was the assignee of the second mortgage on nine of the properties (R. 15,441-15,454). It is perhaps reasonable to infer that Bernstein's interest in the other two properties was also through Jet. In any event, for convenience, we will refer to these properties as "Jet" properties.

from his actions. Eastern Service Corporation was the approved mortgagee used to process the FHA applications on these properties. If the application was approved by the FHA, Eastern Service Corporation would stand to make a gross profit on the property in the form of the "points" it charged for processing the application. Accordingly, it was in the interest of Eastern Service Corporation for the deal to close. In order for the deal to close, the appraiser must accept the property. If the appraiser rejects the property, Eastern Service Corporation loses its opportunity to charge points and make its profit on the particular property. As a result of the bribes, Goodwin accepted three of these properties which he would otherwise have rejected (counts 41, 51 and 65). As a result of the bribes, Goodwin overvalued each of these properties in an amount ranging from \$1000 to \$3000. This overvaluation in turn results in a higher mortgage amount. When Eastern Service Corporation calculates the points it charges on the basis of a certain percentage of the mortgage amount, the overvaluation results in more money, albeit a small increase, being paid to Eastern Service Corporation in the form of points.

Moreover, it should be kept in mind that the arrangement between Goodwin and Bernstein was a prospective one. When Bernstein indicates to Goodwin that a particular property is one of his (meaning Goodwin can expect to receive a bribe on it), Bernstein doesn't know whether or not the property would otherwise be accepted or what kind of value he would otherwise get on the property. If the property is not accepted, or if the FHA value is not high enough to satisfy Jet (whether as owner or second mortgagee), then the transaction will not close and Eastern Service Corporation will not make any money on it. By offering and paying a bribe, Bernstein makes it more likely that the deal will close and that Eastern Service Corporation will be in a position to make money on the transaction.

Finally, in this regard, we have already seen how Bernstein's relationship with Goodwin provided a service to Kapraki to encourage her to bring her business to Eastern Service Corporation. In much the same manner, Bernstein's relationship with Goodwin might properly be viewed by the jury in part as providing a service to Jet to encourage it to bring its business to Eastern Service Corporation.

This brief discussion suffices to point out that there was sufficient evidence for a jury to find beyond a reasonable doubt that Harry Bernstein bribed Goodwin with a dual intent—an intent to benefit Jet and also an intent to benefit Eastern Service Corporation.

(3)

The contentions of appellant Behar and appellant Cardona as to the sufficiency of the evidence are frivolous and can be briefly disposed of. The summary of the evidence contained in the statement of facts shows that there was more than ample evidence to establish beyond a reasonable doubt that Behar, who had the responsibility of signing the mortgagee's certificate on behalf of Eastern Service Corporation, acted with a conscious purpose to avoid learning whether a statement was true or false, or at the very least acted with a reckless disregard of whether the statements made were true. This evidence included the following: (1) knowing that it was against FHA requirements, Behar gave Kapraki a number of blank verification of employment forms; (2) when an applicant's apparent income from his supposed part-time employment was greater than his income from his full-time employment, in order to avoid suspicion Behar instructed Pat Buckley to reverse the jobs in the FHA application, putting the higher-paying job as the full-time employment; (3) when a question arose as to the number of applicants all working at one gas station, Behar accepted Kapraki's statement that they all worked there instead of

sending out an Eastern solicitor to speak to the applicant's supposed employer; (4) Behar was an experienced and competent processor who spent hours with Kapraki going over files of applicants who were supposedly self-employed, files which aroused Fey's suspicions (he indicated that he would have to be stupid and naive not to know there was something wrong); * (5) Fey told Behar that he thought Kapraki's deals with self-employed applicants were "phony"; (6) Behar complained to D & B about credit reports which failed to mention an applicant's claimed self-employment, and demanded that the credit reports be changed under threat of taking away Eastern's business from D & B; (7) Behar had a strong motive to consciously close her eyes or act recklessly, in that Kapraki was paying her \$150 to \$250 per property; (8) Behar used her leverage to increase the amount of money Kapraki was paying her per property; (9) Behar on occasion expressed to Kapraki her concern for getting the "right man" in the credit section of the FHA to examine and approve the application; (10) when a question arose as to so many applicants being self-employed, making a good income, and not having a telephone, Behar again accepted Kapraki's absurd explanation instead of sending out an Eastern solicitor to investigate. See the government's summation in this regard, R. 20,748-20,787. See also *United States v. Levinson*, *supra*, 405 F.2d at 986.

Appellant Cardona concedes that there is sufficient evidence to support his conviction. Cardona's position in this regard is to request this Court to reconsider its prior

* Appellant's attempt to brand Fey's state of mind as simply prejudice against minority groups (brief, p. 48) is a distortion of the evidence, and was satisfactorily refuted in the government's summation (R. 20,795-20,799). As to Behar's authority, while Fey testified she did not have the authority to stop processing Kapraki's applications, she did have the authority and discretion to report irregularities as to Kapraki's applications. This Behar did not do!

rulings that a conviction may rest upon the uncorroborated testimony of accomplices. Putting aside the fact that the testimony of Kapraki and Abad was corroborated by various documentary evidence, including the checks representing some of Kapraki's payments to Cardona for the false financial statements concerning self-employment, appellant has not presented any valid reason for changing this long-standing rule as to accomplice testimony. See *United States v. Messina*, 481 F.2d 878, 881 (2d Cir.), *cert. denied*, 414 U.S. 974 (1973); *United States v. Agucci*, 310 F.2d 817, 833 (2d Cir. 1962).

POINT VI

The court's evidentiary rulings were proper and did not constitute reversible error.*

Appellant Behar contends that the court made a variety of errors in its evidentiary rulings during the trial, which served to deny her a fair trial. These rulings will be specifically discussed below in subdivisions (1) through (8) of this point. While it is sometimes difficult to determine from an examination of the record, it appears that only the questions raised in subdivisions (1)—(3) were properly preserved for appeal. In any event all are without any merit.

(1)

Appellant Behar points to evidence relating to the series of transactions involving the FHA valuation of Jet properties (bribery of Goodwin by Harry Bernstein on specific Jet properties; further overvaluation of some of those same properties by Cronin's use of the CUP). Appellant claims that there was *absolutely no evidence* that she was aware of any of these transactions, and that the trial court improperly excluded her from a limiting instruction which it gave to the jury as to this evidence (R. 13034-13039, 14507,

* In response to Points II(B), VII and VIII of Behar's brief.

14548, 14554-555, 14628).^{*} The conclusion which appellant draws from this premise is that it "may well be" that the jury utilized this evidence in finding criminal intent on her part on the separate charges of aiding and abetting the payment of bribes by Kapraki to Goodwin. Both the premise and conclusion are simply wrong.

It has already been pointed out under Point II that Behar was aware that the Bernsteins had a bribery relationship with Goodwin on properties other than Kapraki's. Since she was aware of the broader scope of the conspiracy, the evidence was properly admissible against her provided, as is the case here, that there was sufficient independent evidence of her membership in the conspiracy. Accordingly, she was properly excluded from the limiting instruction.**

Not only is the premise of Behar's argument erroneous, but also there is absolutely no basis in the record for the completely speculative conclusion appellant draws from it. There was no *Pinkerton* charge requested or given in this case. To speculate that the jury used evidence of transactions in which Behar did not participate to convict her on bribery counts as to which there was direct evidence of her involvement is simply absurd. See *United States v. Milcy, supra*, slip op. at 2391-2393.

(2)

During the period from the summer 1968 until March 1970, Kapraki had approximately 200 closings of FHA insured mortgages at Eastern Service Corporation. After

^{*} Goodwin's testimony related to bribery in connection with both Jet and Kapraki properties. Behar was directly involved in aiding and abetting bribery on the Kapraki properties. Hence, appellant Behar's request (R. 13034-13039) that none of Goodwin's testimony be admitted against her was clearly too broad.

^{**} The limiting instruction was applicable to particular defendants as to whom there was no evidence connecting them to the bribery aspect of the conspiracy. Behar clearly did not fall within this category.

each closing, except for those in a short period of time from May to June 1969, Kapraki gave money to appellant Behar by placing an envelope in her desk drawer. The amount of money varied per closing. It started out in the spring 1968 at \$50 or \$75 per property, increased to \$150 per property shortly thereafter, increased to \$200 per property as of November 1968, and \$250 per property as of June 1969. The money was usually paid in cash, but sometimes by check. On four occasions in November 1968 Kapraki made out a check to cash, put the check in the envelope, and gave it to Behar. Behar's endorsement was on the back of these checks. On March 17, 1969, and on 19 other occasions from September 1969 through January 1970, out of the proceeds due her at the closing Kapraki had Eastern Service Corporation draw a check to her in the amount of \$250 or \$500. On these 20 occasions Kapraki endorsed the check, put it in an envelope, and gave it to Behar. One of these checks was endorsed and deposited in the account of Florence Behar and her husband. Seventeen of the checks were endorsed and deposited in the account of Florence Friedman, Behar's maiden name. Two were cashed with and endorsed by Eastern Service Corporation. The money represented "tips" to Behar to expedite Kapraki's cases. [R. 3101-3102, 3112-3113, 4331-4332, 4490-4512, 5361, 5376-5421, 5445-5455, 6060, 6067, 6077-6078, 11615-11633.]

Of the 20 checks drawn on the account of Eastern Service Corporation and given to Behar by Kapraki, none represented a "tip" for a property specifically involved in the substantive counts of the indictment, and only one represented a "tip" for a specific property as to which the government offered evidence of false statements as to employment and income therefrom (on one of the severed counts which was an overt act of the conspiracy count). The other nineteen of these checks represented "tips" on properties which were identified, but there was no specific proof one way or the other as to any illegal activities in connection with these properties. Appellant Behar objected below

(R. 5376-5383), and presses her claim on appeal, that these nineteen checks were irrelevant.

The evidence of money paid by Kapraki to Behar, of which these 19 checks are a part, was offered to show the relationship between Behar and Kapraki, and as evidence of motive. At the beginning Kapraki's deals were "clean". However, there came a time when Kapraki did create false statements. Although there was no "quid pro quo" concerning the submission of false statements and this money, the monetary relationship which they had provided a strong motive for Behar to close her eyes and exhibit a reckless disregard as to the truth or falsity of statements in each of the applications on Kapraki's properties which were submitted to the FHA. Surely this evidence, including the checks, was relevant and highly probative in establishing motive. Indeed, the oral testimony that Kapraki paid Behar money after every closing came in without any objection (R. 3112-3113). Likewise, there is no valid objection to the evidence showing the form (checks) in which some of this money was paid.

(3)

Appellant Behar claims that the trial court erroneously advised the jury as to the defendants and counts which had been severed from the trial (R. 3840-3847), and in its charge as to which of the severed defendants had entered pleas of guilty (C. 295). It appears that appellant Behar joined in the exceptions of other counsel to this part of the court's charge (C. 668, 619). Since the defendants who were severed from the trial were still named as co-conspirators in the conspiracy count, surely it was within the court's discretion to advise the jury that these defendants were severed from the trial for the purpose of making it more manageable, a fact already obvious to the jury from their absence. Although it would have been a better practice had the court not advised the jury that various counts

had been severed, surely it did not commit reversible error in so advising the jury. *United States v. Aronson*, 319 F.2d 48, 50-51 (2d Cir.), *cert. denied*, 375 U.S. 920 (1963).

As to the pleas entered by seven of the co-conspirators, the jury had heard four of them testify as to their pleas of guilty. The jury had not heard any evidence as to the pleas of the other three co-conspirators. However, the court did instruct the jury concerning pleas of guilty by defendants not on trial, and told the jury that a plea of guilty is "personal to them and to them alone", and that their guilty pleas "are not to be considered by you in any sense as proof of the other defendant's guilt". The court further instructed the jury that although it may consider the testimony of witnesses who had pled guilty, the jury "may not consider their pleas of guilty as evidence of guilty [sic] in determining the guilt or innocence of the defendants on trial" [C. 314]. This cautionary instruction, especially in the context of this nine-month trial, surely cured any possible error in the court's statements as to the pleas of the co-conspirators. *United States v. Edwards*, *supra*, 366 F.2d at 870; *United States v. Dardi*, *supra*, 330 F.2d at 333; *United States v. Aronson*, *supra*, 319 F.2d at 51-52.

(4)

Appellant Behar points to evidence of false statements presented to the jury under an "overt act" or "similar act" theory and claims that it added nothing to the case except time and confusion. Recognizing that a trial court has broad discretion in admitting evidence of overt acts in furtherance of a conspiracy, appellant is forced to contend that the trial court failed to exercise its discretion in this regard, depriving appellant of a fair trial. It should be noted that appellant has failed to point out where in the record this question was properly preserved for appeal.

First of all, appellant overlooks the fact that knowledge and intent were the critical issues with respect to the charges against Behar of submitting false statements to the FHA. Especially under the theory of "conscious avoidance" and "reckless disregard", the proof of additional applications for mortgage insurance containing false statements was highly relevant, material, and probative on these critical issues. The fewer such applications involved, the less likely Behar had the requisite knowledge and intent; the more such applications involved, the more likely Behar had the requisite knowledge and intent. Under these circumstances admission of the evidence was clearly within the court's discretion. See, e.g., *United States v. Brettholz*, 485 F.2d 483, 847-88 (2d Cir. 1973), *cert. denied*, 415 U.S. 976 (1974).

Second, appellant Behar fails to particularize her contention. Accordingly, it suffices to point out that Kapraki testified in detail with respect to applications for mortgage insurance containing false statements on twenty-one properties. Eighteen of these applications involved substantive counts of the redacted indictment. Three involved severed counts of the original indictment, as to which the evidence was admissible under the "overt act" and "similar act" theories; the evidence as to these three applications came in fairly early in Kapraki's testimony. Appellant has utterly failed to point out at what point in the trial the evidence had become excessively cumulative such that the court abused its discretion in overruling a specific objection on these grounds. There simply was no admission of excessively cumulative evidence.*

* Appellant also points to the evidence relating to D & B, the fact that the district court granted a motion by D & B for a judgment of acquittal several months after the jury was unable to reach a unanimous verdict as to D & B, and claims that this caused "a vast separation of time between the introduction of the evidence applicable to her and the consideration of that evidence by the jury" (brief, p. 38). This is neither the time nor the

[Footnote continued on following page]

Finally, appellant's contention that the trial court failed to exercise its discretion is a bald, conclusory statement, and is simply not supported by any fair reading of the record. In support of this contention, appellant points to two references in the record where the trial court made reference to letting counsel try the case in their own way (R. 12423, 15952). This surely does not demonstrate that the court failed to exercise its discretion. Indeed, in those very conversations pointed to by appellant, the court indicated that, although it may use the word "overkill," it did not think that it really fit this case (R. 12423); further, the court indicated that it had made "decisions" as to each question when it arose, and had exercised its discretion as to the number of counts and overt acts (R. 15951-954). Indeed, at one point, when the government attempted to offer evidence of additional false statements in additional applications, the court exercised its discretion in favor of defendants, sustaining their objection (R. 5130, 5137-5170). Other portions of the record also indicate that the court was mindful of, and did exercise its discretion (see, e.g., R. 3191-3205, esp. at 3196, 3205). Appellant's claim is frivolous.

(5)

The trial court received in evidence under 28 U.S.C. § 1732 certain exhibits as records made in the regular course of Kapraki's business, including among others a ledger book containing bookkeeping entries as to the various houses she bought and sold in her business, 48th Street Realty Co. (R. 3360-3374),* and various closing state-

place to point out why the trial court's denial of D & B's motion for a directed verdict at the close of the government's case and at the close of the entire case was proper. It suffices to point out that much of this evidence as testified to by D & B employees would have been admissible even if D & B had not been a defendant. The evidence was clearly admissible against Behar herself, as well as Eastern Service Corporation, the Bernsteins, and Cardona on the false statement charges.

* Certain pages of the record, 3366A—3366Q, were inserted in the wrong place by the court reporter. These pages should appear immediately after R. 3358.

ments prepared by Kapraki's attorneys as part of her real estate business and maintained under her supervision in an accounting file for the particular property (R. 3350-3352, 3556-3567, 3581-3583, 3645-3650, 3779-3781, 3833-3836, 3917-3918, 4005-4006, 4230-4232, 4316-4317, 4403-4404, 4477-4488, 4577-4579, 4644-4646, 4666-4668, 4694-4696, 4832-4834, 4849-4850, 4877-4880, 4931-4932, 4981-4982, 5052-5053, 5122-5124, 5223-5226, 5275-5277, 5339-5340). Although it appears from the record that appellant Behar has not properly preserved this for appeal, appellant contends that these exhibits were improperly admitted.*

Appellant points out that some of the entries in the ledger were inaccurate. Appellant appears to be referring specifically to the entries that indicate Kapraki paid Mrs. Behar \$150 in connection with each property in 1968 and 1969, whereas Mrs. Kapraki testified that she paid Mrs. Behar \$150 per property, but that this increased to \$200 per property as of November 1968 and \$250 per property as of June 1969. However, the inaccuracy in the ledger as to the *amount* of the payment to Behar on some of the properties (but not as to the fact of a *payment of money* to Behar) does not affect the admissibility of the ledger. The proper foundation was laid as to the entries in the ledger being made by Kapraki's bookkeeper in the regular course of Kapraki's business. As to any inaccuracies, 28 U.S.C. § 1732 specifically provides as follows:

* Although appellant's counsel did conduct a voir dire concerning the ledger, he did not object to its admission at that time. Later, after it had been admitted, Behar's counsel did move to strike it (R. 3399-3400). Appellant has also failed to point out any specific objection by her to the admission of the closing statements. Although on some occasions references were made by the court to objections by defense counsel generally (see, eg., R. 4834, 4850, 4880), nowhere does it specifically appear that Behar's counsel made a specific objection. Indeed, on two occasions Behar's attorney specifically indicated that he had no objection to the particular closing statement (R. 3780, 4231).

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

See *United States v. Schwartz*, 464 F.2d 499, 511 (2d Cir.), *cert. denied*, 409 U.S. 1009 (1972); *United States v. Re*, 336 F.2d 306, 311-314 (2d Cir.), *cert. denied*, 379 U.S. 904 (1964); *United States v. Bernard*, 287 F.2d 715, 721 (7th Cir.), *cert. denied*, 366 U.S. 961 (1961). Moreover, since it was clear at trial that Kapraki was the only one who had first-hand knowledge of the payments to Behar, and she testified as to these payments, the ledger entries did no more than recount the payment to Behar from the same ultimate source as Kapraki's oral testimony. Therefore, appellant was in no way prejudiced by the admission of the ledger. *United States v. Schabert*, 362 F.2d 369, 371-72 (2d Cir.), *cert. denied*, 385 U.S. 919 (1966).

The record demonstrates that the proper foundation was also laid for admission of the closing statements. Appellant's point appears to be that each closing statement was prepared by an attorney, not by anyone in Kapraki's office. Appellant overlooks the fact that the attorney was retained by Kapraki for the closing, prepared the statement for Kapraki as part of the regular conduct of *Kapraki's* business, and the statement was maintained as part of her business in the accounting file for the particular property. Moreover, appellant has failed to show any prejudice against her arising out of the admission of the closing statements.

(6)

During the course of the trial the witness Kapraki testified concerning a great number of conversations which she had with various persons, including appellant Behar.

As to some of these conversations, the witness was unable to fix an exact time and was unable to recall the name of the particular mortgage applicant or the particular property address involved. However, the witness did have a *specific* recollection as to the substance of the conversations. Appellant Behar points to two such conversations Kapraki had with her, which were clearly relevant on the relationship between Kapraki and Behar and on Behar's knowledge and intent (R. 3654-3664, 4455-4461). Appellant apparently contends that the conversations were improperly admitted, in that the witness was unable to identify the particular transaction which the conversation related to.*

While a reading of the portion of the record referred to indicates that appellant did not object at trial to the evidence on this specific ground, the claim in any event is without merit. In determining the admissibility of evidence where an objection is based on the quality of the witness' recollection, a distinction is drawn between a faintness of recollection of an event and total lack of personal observation of the event. In general, where there has been an actual observation of an event by the senses (in this case, a hearing of words spoken by Behar) the degree or quality of recollection affords no ground for objection. 2 Wigmore, *Evidence*, § 658 (3d Ed. 1940); 3 Wigmore, *Evidence*, §§ 726-729 (Chadbourn rev. 1970); McCormick, *Evidence*, § 10 (2d Ed. 1972); Richardson, *Evidence*, § 477 (8th Ed. 1955). To accept such recollections "is after all not dangerous, since they carry in

* Appellant also points to evidence of conversations which the D & B employees testified they had with mortgage applicants, and evidence of conversations they had with each other concerning these conversations with mortgage applicants, and makes a similar objection to this evidence. The court gave a limiting instruction that this evidence was not offered or admitted against Behar and certain other defendants. In any event the objection now made is without any merit, for the same reasons as stated in the text *infra*.

themselves a warning of their evidential weakness. The best judicial opinion does not insist on any degree of positiveness in the recollection, but accepts whatever the witness feels able to present." 3 Wigmore, *supra*, § 726 at p. 72.

(7)

In determining the essential element of falsity of the statements in each application, the jury was limited to particular statements relating to employment and income therefrom. These false statements were created by Kapraki and appellant Cardona, as Kapraki testified. The procedure which they used followed a certain pattern. When the mortgage applicant came to Kapraki's office, she would ask the applicant questions as to his employment and income. If the income from his employment was not sufficient to obtain a mortgage on the property in question, a second job would be made up for the mortgage applicant. Kapraki, Cardona, and others participated in the acts of creating and verifying the false second job and income therefrom.

The conversations with Cardona and others who participated in the acts of creating and verifying the false employment and income were clearly verbal acts in furtherance of the conspiracy. See, e.g., *United States v. Tramunti, supra*, slip op. at 2143. However, the court did not reach this question as to the conversations between Kapraki and the mortgage applicants, as these conversations were not offered to establish the truth of their content (see, e.g., R. 3160-3181, 3612-3620). Although appellant Behar has failed to point out where in the record she made a specific objection to any of these conversations on the ground of hearsay, appellant now contends that the conversations with the mortgage applicants were hearsay, and that the court erred in admitting the conversations.

An oral statement which is not offered to prove the truth of the matter uttered is not hearsay. The statement by each mortgage applicant to Kapraki was offered without

reference to the truth of the matter uttered by the applicant. It simply did not matter whether what the applicant told Kapraki was true or false. It simply served to shed light on, explain, and give significance to the conduct and transactions of Kapraki and others in creating the false second job and income therefrom which appeared as statements in the applications for mortgage insurance. Of course, the falsity of this second job and income therefrom was an essential element of the crime, which the government proved through the testimony of Kapraki as to her own conduct. Thus, whether the conversations between Kapraki and the mortgage applicants are viewed as conversations which "shed light on [Kapraki's] several transactions" in creating false statements, see *United States v. Frank*, 494 F.2d 145, 155 (2d Cir.), *cert. denied*, — U.S. —, 95 S. Ct. 48 (1974), or as verbal parts of acts ("verbal acts"), see 6 Wigmore, *Evidence*, §§ 1772-1776 (3d Ed. 1940); McCormick, *Evidence*, § 249, at p. 589 (2d Ed. 1972), or as utterances used circumstantially to show their effect on Kapraki, see 6 Wigmore, *supra*, § 1789; McCormick, *supra*, § 249, at pp. 589-590, the evidence was not hearsay and was properly received in evidence. See 6 Wigmore, *supra*, § 1766. As this Court said in *United States v. Frank*, *supra*, 494 F.2d at 155, "No matter how often appellate courts and commentators seek to explicate the true nature of the rule, the notion that any reference to a conversation constitutes hearsay, inadmissible unless within an exception, dies exceedingly hard."

(8)

During the course of the trial Kapraki testified about a conversation with appellant Behar, in which Behar tried to "extort" more money from Kapraki per case. Mrs. Kapraki agreed to pay Behar more money per property. After that conversation, Kapraki told Pat Buckley, a processing girl who worked under Behar's supervision, what had happened in that regard. [R. 4331-4332.] Then the following took place at the trial (R. 4332-4333):

Q. Was anything else said in that conversation?

A. No. I don't recall.

Q. Did the subject matter of the quality of your deals come up? A. Yes.

Q. What was said in that regard? [*No objection by defense counsel.*] A. I told Pat Buckley, I said, 'My deals are so terrible, it's so awful.' She said to me, 'Don't worry about that. Your deals aren't bad at all. They're very good compared to these other brokers that Florence Behar is working for, these petty [sic—pet] brokers of hers, so don't feel bad.'

Behar's attorney then objected, and the court struck the testimony. Other counsel moved for a mistrial, which was denied. The court directed the jury that it was to ignore the testimony, that it was stricken from the record. [R. 4333-4335.]

Appellant contends that the testimony was elicited for the sole purpose of prejudicing the jury by advising them that Behar was engaged in the same type of activity with other brokers on a "wholesale basis". There is no need to resolve here the question of the admissibility of this evidence, as the court exercised its discretion and struck the testimony.* It was elicited in good faith (R. 4342-4346),

* The government submits that the evidence was admissible within the discretion of the trial court. The summary of the evidence in our statement of facts shows clearly that Buckley was a co-conspirator (she pled nolo contendere to the entire indictment at the opening of the trial). Accordingly, this conversation could properly be viewed as one in furtherance of the conspiracy (Kapraiki was rather upset at the time, and this conversation served to calm her and encourage her to continue doing business with Eastern Service Corporation). This is not a situation, as in *United States v. Cirillo, supra*, 499 F.2d at 884-885, where there was insufficient independent evidence to connect Behar with the conspiracy. Further, the conversation also was relevant to show the state of mind of a co-conspirator, Buckley, toward Kapraiki's

[Footnote continued on following page]

the question was not objected to, and the court took firm action in striking the testimony and directing the jury to ignore it. Under these circumstances, and in the context of this nine-month trial, there was surely no prejudicial error. *United States v. Cohen*, 489 F.2d 945, 950-951 (2d Cir. 1973). See also *United States v. Aloï*, *supra*, 511 F.2d at 602.

(9)

Appellant Behar concludes this portion of her brief with the comment that "in the present case, the relatively few incidents which we have thus far noted, give some indication of the quality of trial afforded to the defendant. It is respectfully submitted that that quality was so insufficient and so affirmatively defective that the judgment cannot stand". We have already shown that appellant's contentions as to a variety of "errors" are without any merit. Considering the length and nature of the trial, the few claims of error which appellants press and their lack of substance surely do give some indication of the quality of trial afforded appellants—namely, that they did indeed receive a very fair trial.

POINT VII

The charge on the element of knowledge was proper.*

Appellants Harry Bernstein, Eastern Service Corporation, and Florence Behar contend that the trial court's charge to the jury on the element of "knowledge" applicable to the false statement counts and the false statement object of the conspiracy count was erroneous.

cases. Insofar as it circumstantially reflects on Behar, it also shows her state of mind toward Kapraki's cases; unlike in the *Cirillo* case, Buckley's knowledge of Behar's situation is first hand, based on a personal relationship between Buckley and Behar.

* In response to Point III of Bernsteins' brief, and Points IV, VI of Behar's brief.

(1)

Knowledge is an essential element in the crime of submitting a false statement in violation of 18 U.S.C. § 1010. *United States v. Leach*, *supra*, 427 F.2d at 1111. The government did not contend that appellants Harry Bernstein, Florence Behar, or Eastern Service Corporation had actual knowledge of the falsity of any particular statement in the applications for mortgage insurance. Rather the government relied on the theories of conscious avoidance and recklessness as to these appellants. Appellants attack the court's instructions on the theory of recklessness.*

The theory of recklessness rests on the following proposition. Where a person who makes, passes, utters or publishes a false statement is under an affirmative duty to investigate, the element of knowledge is satisfied by proof beyond a reasonable doubt that a defendant recklessly stated as facts things of which he was ignorant, or acted with a reckless disregard of whether the statements made were true. The jury was so instructed (C. 512).** This meaning has been applied to the requirement of "wilful" or "knowing" conduct in the context of criminal laws dealing with the enforcement of the Securities laws. See *United*

* The court's charge on conscious avoidance (C. 509-511) was proper and in accordance with the standards set forth in *United States v. Brawer*, 482 F.2d 117, 128-129 (2d Cir. 1973) and *United States v. Jacobs*, 475 F.2d 270, 287-288 (2d Cir.), *cert. denied*, 414 U.S. 821 (1973).⁹ However, since there is no way of knowing whether the jury convicted these appellants on a theory of conscious avoidance or recklessness, the convictions of these appellants on the false statement counts must be reviewed on the basis of the theory of recklessness.

** The jury had already been instructed that proof of mere negligence was not sufficient to establish guilty knowledge (C. 511). The jury was also instructed that proof of specific intent was required to convict (C. 514-515).

States v. Benjamin, *supra*, 328 F.2d at 862-863; * *Bentel v. United States*, 13 F.2d 327, 329 (2d Cir.), *cert. denied*, 273 U.S. 713 (1926). See also *United States v. Simon*, 425 F.2d 796, 805, 809, 810, 812 (2d Cir. 1969), *cert. denied*, 397 U.S. 1006 (1970). The rationale for this meaning of "knowingly" in that context has been stated by this Court in *United States v. Squires*, 440 F.2d 859, 863 (2d Cir. 1971):

In those areas of fiduciary responsibility (enforcement of the Securities laws) the persons issuing statements are under an affirmative duty to investigate, and it is entirely appropriate to include 'should have known' within the definition of 'know'.

Accordingly, the critical issue herein is whether or not these appellants were under an affirmative duty to investigate. As will be shown below, an approved mortgagee issuing statements in the context of applications for mortgage insurance to the Federal Housing Administration is under an affirmative duty to investigate. Therefore, it is appropriate to apply the above-mentioned meaning of "knowingly" to the instant case; the court's instructions on the theory of recklessness were proper.

* The *Benjamin* case (328 F.2d at 863) noted that other circuits have gone even further as to this requirement, citing cases which held that even a good faith honest belief that the statements were true was not a defense where the defendant, by the exercise of due diligence, would have become aware that the statements were false. These cases, also in the context of the Securities laws, were *United States v. Schaefer*, 299 F.2d 625 (7th Cir.), *cert. denied*, 370 U.S. 917 (1962) and *Stone v. United States*, 113 F.2d 70 (6th Cir. 1940). However, in the case at bar, it is not necessary to go that far. See also *United States v. Cooperative Grain and Supply Co.*, 476 F.2d 47, 59-60 (8th Cir. 1973) (holding that a negligent misrepresentation or a misrepresentation made with reckless disregard of its truth or falsity constitutes the necessary "knowledge" under the civil false claims act, subjecting the defendant to double damages; the court noted that in certain rare cases "a 'guilty avoidance of knowledge' and a 'bona fide belief resulting from negligence' can form generally the requisite criminal scienter").

Both § 203 and § 221 of the National Housing Act, 12 U.S.C. § 1709 and § 1715L respectively, require that to be eligible for insurance a mortgage shall:

- (1) Have been made to, and be held by, a mortgagee approved by the Secretary as responsible and able to service the mortgage properly. (12 U.S.C. § 1709(b)(1) and § 1715L(d)(1)).

Title 24 of the Code of Federal Regulations, § 203.4(a), (c), sets forth the eligibility requirements for approval of mortgagees applicable to a non-supervised institution such as Eastern Service Corporation. In addition to provisions involving the financial responsibility of a mortgagee, submission of audits by it, an examination of its books and affairs, and the segregation of certain funds, the regulations require that it "shall have as its principal activity the lending or investment of funds under its own control in real estate mortgages", and "shall comply with any other conditions that the Commissioner may impose". § 203.7 sets forth reasons by which approval of a mortgagee may be withdrawn, including among others a violation of its responsibilities with respect to the segregation and use of escrow funds, or "such other reason as the Commissioner determines to be justified".

The regulations also set forth eligibility requirements for mortgagors. 24 C.F.R. § 203.33 provides that a "mortgagor must establish that the periodic payments required in the mortgage submitted for insurance bear a proper relation to his present and anticipated income and expenses". § 203.34 further provides that "a mortgagor must have a general credit standing satisfactory to the Commissioner." *

* § 203.4, § 203.7, § 203.33 and § 203.34, referred to above concerning eligibility requirements of mortgagees and mortgagors under § 203 of the National Housing Act, are also made applicable to mortgages under § 221 of the National Housing Act by 24 C.F.R. § 221.1.

However, these requirements for mortgagors are not directed only to the mortgagor, but also to the mortgagee. Both the mortgagor and the mortgagee stand to benefit from the issuance of mortgage insurance. The issuance of mortgage insurance virtually removes the risk of default from the lending institution, and transfers it to the FHA. Further, it is the mortgagee which deals directly with the FHA and submits the applications for mortgage insurance. It is the mortgagee, not the FHA, which deals directly with the mortgagors and the real estate speculators. It is the mortgagee, not the FHA, which gathers the facts and certifies to them in the applications.

24 C.F.R. § 203.11 provides that the "application must be made upon a standard form prescribed by the Commissioner". The application is further discussed in the *Mortgagees' Handbook*.^{*} Section 109 of that handbook requires that certain documents and exhibits be submitted by the mortgagee with the application. These required exhibits, as enumerated on the FHA form 2900 (C. 1129) applicable to the period involved in this case, include a credit report, form 2004F (verification of deposits), form 2004g (verification of employment), and a currently dated balance sheet and operating statement if the mortgagor's principal income is from his own business. Section 119 provides that inasmuch as the FHA derives its knowledge of the borrower largely from the application and supporting exhibits, "it is essential that each item be correctly

^{*} The *Mortgagees' Handbook* is sent to all approved mortgagees. Eastern Service Corporation received a copy of it at the time it became an approved mortgagee (R. 2217-20). The implication on p. 37 of Bernsteins' brief that instructions in this handbook have no binding effect on the mortgagee is erroneous. An examination of the testimony referred to by appellants shows that the government witness was referring only to Volume VII, Book I of the FHA Manual involving underwriting procedures as to home mortgages (directed to the FHA), not to the handbook which goes to the mortgagee. The relevant portions of the handbook are set forth in the appendix (D. 2 et seq.).

and adequately completed, so that a decision may be reached as to eligibility without further inquiry" (D. 11). Further, section 121 provides (D. 13, 15):

FHA's mortgage insurance underwriting, as related to credit analysis, does not permit, as a general practice, the use of many methods commonly used by other credit institutions; e.g., FHA seldom has the benefit of personal interviews with mortgagor-applicants or the facilities for the more intensive type of investigation. FHA, therefore, must depend heavily on credit reports and such reports must be reliable and adequate in every respect . . . FHA is confident that mortgagees share FHA's concern that accurate and complete credit information be available in all cases and will make extensive use of the services available to them to improve the quality of credit information and expedite the processing of applications.

Moreover, the application form requires the mortgagee to certify "that all information in this application is true and complete to the best of its *knowledge and belief*" (emphasis supplied).^{*} Immediately below this certifica-

^{*} Appellants' claim that the system never contemplated the fraudulent activities of an Ortrud Kapraki, and their cavalier treatment of the mortgagee's certificate is simply contrary to the scheme set forth in the statute, regulations, and instructions embodying the FHA program. In 12 U.S.C. § 1709(e) Congress provided that the contract of insurance between the FHA and an approved mortgagee was "incontestable", "except for fraud or misrepresentation" by the approved mortgagee. This is a clear indication that Congress did intend that an approved mortgagee have an affirmative duty as discussed in the cases, *infra*, on p. 120 herein, and in *United States v. Cooperative Grain and Supply Co.*, *supra*, 476 F.2d at 59-60. The mortgagee's certificate is a critical part of this scheme (R. 2463, 2473, 2476-78, 2482-83). Under these circumstances surely it was contemplated that a mortgagee

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tion, there is a "WARNING" as to false statements in violation of 18 U.S.C. § 1010 (C. 1129).

Finally, the policy underlying the FHA program is one of reliance by the FHA on the mortgagee. As the FHA expert witnesses testified, the FHA relies on the approved mortgagee to submit complete and accurate information. The FHA does not have the staff or the time to verify the information on each application. It does not have the benefit of a personal interview with the applicant. Accordingly, the FHA must rely on the information which the mortgagee has submitted, and its certification that the information is true and complete to the best of its knowledge and belief. On the other hand, the approved mortgagee is in the business of making loans in real estate mortgages; indeed, as noted above, this must be its principal activity. It should have the machinery and facilities required to obtain the complete and accurate credit information necessary for approval of a loan. Further, the mortgagee should exercise good business judgment. It is not just a paper pusher. It has an obligation to evaluate the risk, just as the FHA does. (R. 2222, 2477-2478, 2483, 2548, 2551, 2585-2586.) The loan guaranty program is one of great magnitude; based upon reliance on the mortgagee, millions of dollars worth of mortgages are insured by the FHA.

Upon a consideration of the above-mentioned statute, regulations, mortgagees' handbook, and underlying policy, one must fairly conclude that the FHA's loan guaranty program establishes a relationship in the nature of a fiduciary one between an approved mortgagee and the FHA, and, more importantly, places a duty on the mortgagee

form some knowledge and belief as to the truth or falsity of the statements before it makes the certification. Whatever knowledge appellants had in this case, if any — whatever belief appellants had in this case, if any — it surely was not that all information was true and complete to the best of their knowledge and belief.

to investigate and exercise proper credit judgment with respect to applications for mortgage insurance submitted to the FHA. The case law strongly supports this conclusion. See *United States v. Ekelman and Associates, Inc., et al.*, Civil Action No. 30932 (E.D. Mich. Nov. 1, 1972, at pp. 74-80) (rejecting a contention that a mortgage company had no duty to check and authenticate credit information on a mortgagor, and concluding "from the entire statutory scheme of loan guarantees for veterans that it was the intent of Congress to place a duty on the lender to exercise credit judgment with respect to loans submitted to the Veterans Administration"). See also *First National Bank, Henrietta v. Small Business Administration*, 429 F.2d 280, 282, 287-289 (5th Cir. 1970) (Small Business Administration's loan guaranty program); *In re Fried Furniture Corp.*, 293 F. Supp. 92, 93-94 (E.D.N.Y. 1968); *aff'd* on opinion below, 407 F.2d 360 (2d Cir. 1969) (SBA's loan guaranty program); *Mount Vernon Cooperative Bank v. Gleason*, 367 F.2d 289, 293 (1st Cir. 1966) (VA's loan guaranty program); *Citizens National Trust & Savings Bank of Los Angeles v. United States*, 270 F.2d 128, 133 (9th Cir. 1959) (FHA home improvement loan program). Accordingly, the reckless disregard standard is applicable to appellant Eastern Service Corporation, an approved mortgagee.*

Appellants' brief displays a fundamental misconception as to the nature of the relationship between an approved mortgagee and the FHA, and as to the role played in this case by the finding of an affirmative duty.** The nature

* It might be noted that the fact that the cases just relied on are civil cases is of no moment. As this Court noted in *Bentel v. United States*, *supra*, 13 F.2d at 329, civil principles as to "knowledge" of falsity (reckless disregard) are applied in an appropriate criminal case; only the burden of proof changes in moving from the civil to the criminal side of the court in such a case.

** Thus appellants contend that the statements submitted to the FHA were not those of Eastern Service Corporation, but were

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of the relationship determines whether or not there is any affirmative duty. A finding of an affirmative duty to investigate and exercise proper credit judgment simply serves to bring into play the standard of recklessness as satisfying the requirement of "knowledge". The crime remains the submission of an application containing a false statement with the requisite knowledge, not the mere violation of the affirmative duty to investigate and exercise proper credit judgment. Accordingly, appellants' arguments that they were found guilty of a crime (erroneously equating poor credit judgment with the crime of making false statements) that was unconstitutionally vague and not found in any statute or regulation are misplaced and without any merit.*

Kapraki's, and Eastern's only connection with them was the *ministerial* act of processing them. Appellants contend that the court "equated" poor credit judgment with the crime of making false statements. Indeed, perhaps as a result of this misconception, the brief is replete with inaccurate and erroneous statements concerning the government's theory of the case, the evidence in that regard, and the court's instructions embodying the theory. However, given the considerations of time and space, it would serve no useful purpose to specifically point out each and every one of them.

* The argument that the affirmative duty itself must be found by resort only to a statute or regulation is also of no avail to appellants. Even if this were true, the program set forth in the statute and regulations and the underlying policy sufficiently contemplates the plan of reliance on the mortgagee and benefit to the mortgagee. Further, the regulations specifically require the application to be on a form prescribed by the Commissioner, thus bringing into play the instructions on the form and in the handbook as to the required application. However, the case law referred to earlier does not support appellants' claim in this regard. In ascertaining whether any duty existed the *Ekelman* case referred to the entire relationship between the VA and the lending institution, including the instructions in the lender's handbook, the instructions in the form application, the mortgagee's certification in the application, the policy of reliance on the lending institution, and the testimony of a VA official as to the duty of the lending institution to exercise credit judgment (pp. 74-80). The *First National Bank* case referred to the relationship that existed between the SBA and

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Moreover, a corporation can only act and fulfill its duty through its officers and employees. Appellant Harry Bernstein was the President and sole stockholder of Eastern Service Corporation during the relevant period herein. As such, he set the policy of the company and controlled its operations and the real estate speculators with whom it dealt. Appellant Florence Behar was an Assistant Vice President of Eastern Service Corporation in charge of the processing section. As such, she had the responsibility to sign the application and mortgagee's certification on behalf of Eastern Service Corporation. Occupying these positions, they too had some affirmative duty to insure that the statements made in the applications were true; having totally failed to discharge this responsibility, they are not permitted to escape the consequences of their inattention. *United States v. Andreadis*, 366 F.2d 423, 430 (2d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967) (as an alternative ground, holding president of company criminally liable for false claim made for his product by an agency which he had arranged to handle the advertising, even if he did not actually know the claims were false).^{*} Accordingly, since

the bank, including the policy of reliance on the bank and the fact that the bank benefited directly from the guaranty of the loan (429 F.2d at 282, 287-289). The *Mount Vernon* case likewise referred to the relationship between the VA and the lending institution, including the VA instructions as to obtaining a credit report, the certification on the application, and the policy of reliance on the lending institution (367 F.2d at 293). These cases rejected the claim that the duty of investigating and exercising credit judgment was placed solely on the government body, and not on the lending institution.

^{*} The court in its charge to the jury specified which defendants it might find had an affirmative duty, and described the nature of that duty. As to appellants Harry Bernstein and Florence Behar, the court initially told the jury that it may find an "affirmative duty to insure that statements made in the application were true" (emphasis supplied) (C. 513). Appellants attack the use of the word "insure." The word was taken from the *Andreadis* case (366 F.2d at 430). However, to avoid any possible confusion as to the meaning of the word, the court quite properly

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Bernstein and Behar were charged with the responsibility of fulfilling the duty imposed on an approved mortgagee, the reckless disregard standard is applicable to them as well.

Finally, appellants contend that the question as to whether an affirmative duty existed is "obviously" a question of law, and not of fact. Accordingly, the argument goes, since the court submitted this to the jury as a question of fact (C. 512-513), the convictions on the false statement counts must be reversed. However, this argument is also of no avail to appellants.

Appellants imply in their brief (Bernsteins' brief, pp. 39-40) that it was their position at trial that the question was one of law to be decided by the court. Initially it appears that defense counsel, with the apparent exception of counsel for Behar, did take this position, and the government was prepared to agree with it (R. 18918-18919, 18932, 18939-18945). On the next day, the court indicated that it would instruct the jury that there was an affirmative duty under the FIA program (R. 19066-19069a); the court had even prepared its charge to that effect (R. 19162-19163). However, defense counsel apparently changed their position in this regard. In any event it is clear that defense counsel did request the court to submit the question of an affirmative duty to the jury as a question of fact rather than charge it as a matter of law (R. 19069-19070, 19128-19129, 19134-19137). It is clear from the record that appellants' final position at trial concerning the court's charge on affirmative duty was that if the court was going to discuss the matter at all with the jury, they wanted the court to submit the question as one of fact to be decided by the

clarified the nature of the duty which the jury could find, describing it as "a duty to investigate and exercise proper credit judgment" with respect to statements contained in the applications (C. 709). Therefore any possible confusion as to the meaning of "insure" and the nature of the duty was removed.

jury (R. 19769-19774). Incredibly, appellants fail to point this out in their brief and leave this Court with an erroneous impression as to their position at trial. Since appellants' requests as a matter of trial strategy were complied with by the court, appellants cannot now complain that it was submitted to the jury as a question of fact.* Whether it be a question of fact or law or a mixed question, the sole issue that need be decided herein is whether or not such an affirmative duty existed. If it did, which we contend has clearly been shown above, then the convictions on the false statement counts should be affirmed.

(2)

Appellants Harry Bernstein, Eastern Service Corporation, and Florence Behar contend that even if the reckless disregard standard is applicable to the substantive false statement counts on which they were convicted, it cannot be applied to the conspiracy count.** For, the argument goes, one cannot "recklessly" enter into a conspiracy. Accordingly, they urge reversal of their convictions on the conspiracy count.

* While it is not as clear as appellants make it that there was no issue of fact involved in this question, cf. *Guy v. United States*, 336 F.2d 595, 597 (4th Cir. 1964), it surely is clear that no error affecting appellants' substantial rights is involved. Indeed, once the court decided that such an affirmative duty did exist, it was to appellants' advantage to have the question submitted for decision by the jury, rather than the court charging the jury that such an affirmative duty existed. If the jury decided that there was an affirmative duty, appellants were no worse off than if the court had so charged the jury. If the jury decided there was no such affirmative duty, then appellants were in a better position. Giving appellants a "second bite at the apple", even if not necessary, surely was not prejudicial. See *United States v. Jacobs*, *supra*, 475 F.2d at 285, n. 31. There was no reversible error in complying with the choice made by appellants on this matter involving their trial strategy. Cf. *United States v. Coughlin*, *supra*, slip op. at 2901.

** But see *United States v. Benjamin*, *supra*, where recklessness was equated with wilful conduct in the context of the Securities laws. The count under consideration was a conspiracy count.

In support of their position, appellants point to the oft-quoted language of Judge Learned Hand in *United States v. Crimmins*, 123 F.2d 271, 273 (2d Cir. 1941).*

While one may, for instance, be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past such a light, for one cannot agree to run past a light unless one supposes that there is a light to run past.

While this premise of their argument is correct, it would appear to miss the point insofar as it relates to this case. The proof has shown that appellants did knowingly and wilfully agree to submit applications containing statements about prospective mortgagors, and that they did it with the specific intent of influencing the FHA with respect to applications for mortgage insurance submitted by Eastern Service Corporation. The remaining issue is their state of mind concerning the truth or falsity of the statements—whether false statements were within the reasonable intentment of the conspirators. Moreover, applying the principles of law in *Crimmins* (123 F.2d at 273) to the case at bar, if it was an “implied term of the agreement” that statements would be submitted whether or not they were false, appellants would be guilty of conspiracy; “for such an agreement would have dealt with” the falsity of the statements, “even though it did no more than provide that” the truth or falsity “made no difference.” See also *United States v. Edwards*, *supra*, 366 F.2d at 869.

* In *United States v. Feola*, — U.S.—, 95 S. Ct. 1255 (1975), the Supreme Court repudiated the line of cases commencing with *Crimmins* which held that knowledge of a jurisdictional element is required to support a conviction on a conspiracy count even though such knowledge was not required on the substantive count. However, the principles of knowledge embodied in these cases are still applicable to elements as to which knowledge is still required in a conspiracy count.

In this regard the court instructed the jury that it "must determine whether the evidence established beyond a reasonable doubt that the defendant in question had actual knowledge that false statements would be submitted to the FHA and acted with this knowledge to further the objects of the conspiracy" (C. 368-369).^{*} However, proof that appellants showed a "continued indifference" to the truth or falsity of the statements about the prospective mortgagors, coupled with a knowledge that in some cases the statements were false, is sufficient to establish this element of the offense. See *United States v. Houle*, 490 F.2d 167, 170 (2d Cir. 1973), *cert. denied*, 417 U.S. 970 (1974); *United States v. Crimmins*, *supra*, 123 F.2d at 273. Further, proof that appellants agreed to participate in a scheme being aware of a high probability that false statements would be included or knowing that the likelihood of false statements was great, or agreed to participate in a scheme which by its very nature would include false statements, and such false statements actually occur, would be sufficient. See *United States v. Corallo*, 413 F.2d 1306, 1326-1327 (2d Cir.), *cert. denied*, 396 U.S. 958 (1969); *United States v. Mingoia*, 424 F.2d 710, 712 (2d Cir. 1970). The trial court properly instructed the jury in accordance with these principles (C. 368-370).

POINT VIII

The charge on aiding and abetting was proper.**

Appellants Harry Bernstein, Rose Bernstein, and Eastern Service Corporation contend that the court's charge

^{*} There is a difference between the term actual knowledge as used with respect to a substantive and a conspiracy count. The government conceded that these appellants did not have actual knowledge of the falsity of the particular statements in a particular substantive count. However, the proof did establish that they were generally aware that false statements were included in some of the applications submitted to the FHA.

^{**} In response to Points IX, X of Bernsteins' brief, and Point V of Behar's brief.

on aiding and abetting the payment of bribes was clearly erroneous. Appellant Behar contends that the court's charge on aiding and abetting the making of false statements erroneously and prejudicially instructed the jury that the aider and abettor (Cardona, Harry Bernstein) could not be found guilty unless the principal (Behar, Eastern Service Corporation) was first found guilty. These contentions are without merit.

(1)

The court's charge on the giving of a bribe or a gratuity, and aiding and abetting such a payment, appears at C. 553-582. The charge properly instructed the jury on the essential elements of these crimes.

Appellants have pointed to three particular aspects of the charge on aiding and abetting payments made by Kapraki which they suggest were clearly erroneous. First, they object to the manner in which the defendants were grouped together in the charge on the substantive counts. An exception was taken below on this ground (C. 611). The court told the jury (C. 411):

Now, for no particular reason other than an effort to make it easier, I shall not discuss each defendant in the order in which they are named in the indictment and the order that we have followed throughout the trial. Rather I shall discuss them in groups.

First I shall discuss Mr. Cronin, and then Mr. Jankowitz, they being the FHA employees.

Next I shall take up Dun & Bradstreet and Arthur Prescott, they being the credit reporting agency and the director of the Hicksville office of Dun & Bradstreet, Inc., respectively of course,

And then I shall discuss the other five named defendants, Mr. Harry Bernstein, Mrs. Rose Bern-

stein, the Eastern Service Corporation, Mrs. Florence Behar and Mr. Melvin Cardona, the individuals being in some way associated with the Eastern Service Corporation, and they I will take up as a group.

Further, in discussing the charges against the five defendants in this last group, the court discussed the false statement charges separately from the bribe-giving charges. Surely this manner of discussing the defendants and charges made all the sense in the world. Moreover, the court concluded its charge by telling the jury that its verdict "must be given separately for each count and for each defendant", that it must be "a unanimous verdict on each count", that it "need not be the same on each count", and that it should be guilty or not guilty "under each count as to any particular defendant" (C. 586-587). The jury was sufficiently advised of the importance of giving separate consideration to each defendant and each charge (C. 332) (see also C. 292, 298, 301, 307, 389, 503, 506, 509, 510, 554, 560, 566, 580).

Secondly, appellants claim that in substance the court charged that if the jury was convinced beyond a reasonable doubt that a payment by Kapraki was made, conviction must follow (Bernsteins' brief, pp. 83, 84). It does not appear that any exception was made on this ground below. The quotation which appellants refer to from the court's charge is taken completely out of context. See *United States v. Pacelli*, 491 F.2d 1108, 1120 (2d Cir.), *cert. denied*, — U.S. —, 95 S. Ct. 43 (1974). The court had already charged the jury on the essential elements of bribe-giving, giving a gratuity, and aiding and abetting the payments given by Kapraki. It had told the jury on aiding and abetting a bribe (C. 571-572):

If you find in any particular count that a payment [by Kapraki] constituting a crime was not made, then you must acquit all those who are accused of aiding and abetting in that count. If you find that a crime was committed by Ortrud Kapraki,

then with respect to each particular count, the defendant who is alleged to have aided and abetted Mrs. Kapraki, you must find beyond a reasonable doubt that the defendant in some way associated himself or herself with the bribe and its purposes, that he participated in the association he wished to bring about [sic], and that he sought by his action to make the bribe payment succeed.

In other words, you must find that Mrs. Kapraki had a corrupt intent and that the defendants shared that corrupt intent and acted in a manner to assist her in achieving her goal.

The comment pointed to by appellants was then made in the context of the court explaining how the jury should proceed in considering the differences between bribery and its lesser-included offense (giving a gratuity) (C. 579-580). The court told the jury that it should first consider the bribery charge (C. 580):

First you should determine *with respect to each defendant* whether or not the payment of money was made corruptly and with intention of influencing the official act of a Government official.

If you are convinced beyond a reasonable doubt *that the payment was so made*, then you must convict the defendant or defendants of that count. If you are not convinced beyond reasonable doubt that the payments or payment in the particular count or counts under consideration was made corruptly and with the intention of influencing the official acts of the Government official, then you must acquit the defendant or defendants on that count. [Emphasis supplied.]

The charge when read in context was eminently proper.

Finally, appellants contend that the court did not charge the jury as to what act or acts were claimed to be or could be considered acts of aiding or abetting. While it does not appear that appellants took an exception to the court's charge on this specific ground below (see C. 650, 663), the contention in any event overlooks the fact that the court properly charged the jury on the principle of aiding and abetting (C. 569-576), and further told the jury that these appellants were charged "with aiding and abetting and counselling the payment of bribes to Edward Goodwin and the defendant Joseph Jankowitz and the Government claims this was done by counselling payment of monies to these men and by arranging to have them assigned to Mrs. Kapraki's cases" (C. 570).

(2)

The court's charge on aiding and abetting the making of a false statement appears at C. 544-553. The court properly instructed the jury on the principle of aiding and abetting a false statement.

Appellant Behar objects to that portion of the charge which conditioned a finding of guilt as to the aider and abettor (Cardona, Harry Bernstein) upon a finding of guilt as to the principal (Behar, Eastern Service Corporation). Appellant did take an exception to the charge on this ground (C. 671).^{*} Appellant contends that there is "no basis in law or in logic or even in the indictment" for this charge. There is, of course, a clear basis in law for the charge. In order to convict a defendant of aiding and abetting another to commit a crime, the jury must find beyond a reasonable doubt that some person (the principal) did commit the crime. Devitt and Blackmar, *supra*, at

^{*} Appellant Behar indicates in her brief (p. 51) that Cardona also objected to the charge on this ground. A reading of the page in the record cited in this regard (C. 681) does not support this claim, nor have we been able to find anyplace in the record where Cardona objected to the charge on this ground.

§ 11.08, and cases cited therein. Moreover, there also was a clear basis in the indictment for the charge. The date specified in each false statement count of the indictment is the date that the application was submitted to and received by the FHA (the date is stamped on the face of the application when it is received by the FHA). The defendants who submitted the application to the FHA were Behar and Eastern Service Corporation (Behar signed the mortgagee's certificate on behalf of Eastern Service Corporation). They, not Cardona, were the principals under this theory.

Appellant contends that the evidence against Cardona, if believed, was overwhelming, and that she was prejudiced because the jury had to convict her in order to reach the defendant Cardona.* That view is contrary to the many indications that this jury was very sophisticated in carefully considering and weighing the evidence, and reached their verdict separately against each defendant and on each count as the court instructed them to do (C. 586). Thus there was no all or nothing charge in this regard. Cf. *United States v. Tramunti*, *supra*, slip op. at 2139, n. 24; *United States v. Calabro*, *supra*, 449 F.2d at 894. Moreover, there is objective proof that there was no prejudice in this regard. Cardona was not named as a defendant in count 9 of the redacted indictment. Behar was named as a defendant in that count. It surely is of no little significance in this regard that the jury convicted her on this false statement count despite the fact that the jury was not called upon to reach any verdict with respect to Cardona on this count. Cf. *United States v. Papadakis*, *supra*, 510 F.2d at 300-301, where the court utilized the objective fact of the jury's verdict as indicating careful deliberation, untrammelled by prejudice.

* While, as appellant points out, the theory of knowledge against Cardona (actual knowledge of the false statements) was different than the theory of knowledge against Behar (conscious avoidance or reckless disregard), it still remains that the evidence against Behar on the theory applicable to her, if believed, was overwhelming.

POINT IX

The court's failure to marshall the evidence did not constitute an abuse of discretion.*

Appellants Harry Bernstein, Rose Bernstein and Eastern Service Corporation contend that their convictions on all counts should be reversed because the trial court did not marshall the evidence in its charge. Of course, appellants have quite a burden to overcome in order to substantiate this claim. For it has long been the law that the question whether or not to marshall the evidence is one within the discretion of the trial court. *United States v. Hyde*, 448 F.2d 815, 842 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058 (1972); *United States v. Kahaner*, 317 F.2d 459, 479, n. 12 (2d Cir.), *cert. denied*, 375 U.S. 835 (1963); *United States v. Gillilan*, 288 F.2d 796, 798-99 (2d Cir.), *cert. denied*, 368 U.S. 821 (1961); *United States v. Cohen*, 145 F.2d 82, 92 (2d Cir.), *cert. denied*, 323 U.S. 799 (1944). As will be shown below, the district court did not abuse its discretion in this regard.

It is perhaps noteworthy in considering the broad discretion a district court has in this regard that appellants have not cited one case in which a conviction was reversed on the ground that the trial court did not marshall the evidence. Appellants rely heavily on *United States v. Kelly*, *supra*, 349 F.2d at 757. Contrary to the implication in the footnote on p. 68 of these appellants' brief, this Court in *Kelly* did not hold that the failure to marshall the evidence was plain error. The Court said in this regard (349 F.2d at 757):

In a case such as this one it was particularly important that the proofs be marshalled in such fashion as to place clearly before the jury the difference between the evidence against Kelly and Hagen and the evidence against Shuck on the single, over-all

* In response to Point VII of Bernsteins' brief.

conspiracy phase of the case. [Citations omitted.] The trial judge should not have agreed to the request by counsel that this marshalling of the evidence be omitted. [Citation omitted.] But, if this were all, we should probably find it difficult to ascribe as reversible error acquiescence in an urgent request participated in by the prosecutor as well as by counsel for all defendants. [Citation omitted.]

The Court reversed the conviction of the minor participant, Shuck, on other grounds (charge on the conspiracy count, failure to sever) and, significantly, upheld the conviction of the central figures, Kelly and Hagen.

Appellants herein were central figures, like Kelly and Hagen. This appeal simply does not present the situation involved in the *Kelly* case. Further, as noted earlier in Points II and VIII, in the context of this case the charge as a whole adequately pointed out the difference in the evidence as to the appropriate defendants (as to some, there was no evidence connecting them with the bribery aspect of the case; as to others, there was no evidence connecting them with the false statement aspect of the case), cf. *United States v. Aloï*, *supra*, 511 F.2d at 598-599, and stressed the importance of a separate determination against each defendant based on his own acts and statements. Moreover, although it was necessary to introduce a substantial amount of evidence in order to properly present the background and setting of the wide-ranging criminal activities, the critical issues which the jury had to decide were not complex: on the bribery counts, credibility of the witnesses; on the false statement counts, knowledge of the falsity. The thorough summations by counsel fully presented and highlighted to the jury the factual contentions of each party.*

* On pages 72-73 of Bernsteins' brief, appellants refer to various parts of the charge which were difficult to follow. It might
[Footnote continued on following page]

The fact that this case was a lengthy one with much evidence does not materially affect the court's discretion in this regard. In *United States v. Hyde, supra*, the Court stated (448 F.2d at 842): "But in a long involved case such as this one, a review of the factual allegations carried risks of omission, over-enumeration, over-simplification of some facts compounded by over-complication of other facts. The question whether to summarize the evidence is one within the trial court's discretion." In *United States v. Gillilan, supra*, Judge Learned Hand stated (288 F.2d at 798): "When as here the evidence is extremely complicated, it is a question for him [the trial judge] to decide how much a detailed restatement in his charge will clarify the issues." In *United States v. Cohen, supra*, a case in which twenty-seven defendants out of seventy-five who were indicted went to trial, and verdicts were rendered as to thirteen defendants after a seven-month trial, Judge Learned Hand rejected a similar contention as is made herein as follows (145 F.2d at 92-93):

. . . indeed the real grievance appears to be that in a case of such great complexity, asserted to have been incurable by any charge of any judge, the judge did not discuss the facts at all. While the accused concede that he was under no absolute duty to do so, they argue that in this particular instance his failure to exert his undoubted powers necessarily resulted in a miscarriage of justice. Granting for argument, they say, that their rights were not in any event hopelessly compromised by such a trial, nothing less than a detailed discussion

be noted that this involved the particular allegations of falsity in the substantive false statement counts, and the counts themselves. Any confusion in this regard was clearly remedied. The court submitted to the jury the documents with the parts alleged to be false circled in red, and a memorandum of jury verdict setting forth the charges and the particular defendants in each charge which the jury was to deliberate upon.

could have saved them. Such reasoning may seem plausible, but in application it falls apart. If the judge had once embarked upon a consideration of the transactions in detail, he would have committed himself to a discussion of them all; otherwise he surely have laid himself open to the charge of undue emphasis. On the other hand, to undertake such a Herculean task would not have helped the jury, but merely have added to the weight of verbiage that they had already been called upon to bear during twelve days of summing up by counsel. Moreover, it would not have been humanly possible to do so without either making serious slips, or of seeming to favor one side or the other . . . in this country not only has the exercise of the power never been obligatory, but the power itself has been somewhat suspect. It is strange to hear an accused complaining of such a failure; we may be assured that, if the power had been used, the complaints would have been louder, and almost certainly better grounded.

Finally, these appellants have not pointed out where in the record, if any place, they clearly advised the district court prior to its charge that they wanted the court to marshall the evidence. A reading of the record covering the discussion of the requests to charge indicates that they made no such request (R. 18835-19209a). Indeed, it appears that appellant Bernstein agreed with the court's decision not to marshall the facts (R. 18853). Surely there was no plain error in failing to marshall the evidence as to these appellants. See *United States v. Kelly*, *supra*; *United States v. Armone*, 363 F.2d 385, 404 (2d Cir.), *cert. denied*, 385 U.S. 957 (1966); *United States v. Giuliano*, 348 F.2d 217, 221 (2d Cir.), *cert. denied*, 382 U.S. 946 (1965). After the charge had been given, these appellants did take an exception to the failure to marshall the evidence (C. 663). However, if a court may properly

deny a written request to charge purporting to summarize the evidence on the ground that it presents an incomplete and inaccurate statement of the evidence, see *Carter v. United States*, 427 F.2d 619, 623 (D.C. Cir. 1970), *Laughlin v. United States*, 385 F.2d 287, 294 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968), surely it requires more than a bald exception to the failure to marshal the evidence after the charge has been given in order to properly invoke the court's discretion in a trial of this magnitude. Cf. *United States v. Coughlin*, *supra*, slip op. at 2901-2902. Under all the circumstances of this case there clearly was no abuse of discretion by the trial court in this regard.*

POINT X

The bribery counts are not multiplicitous.**

Appellants Harry Bernstein and Eastern Service Corporation were charged in various counts of the redacted indictment with having directly paid a bribe to the FIA appraiser Goodwin (counts 39, 41, 42, 44, 46, 48, 50, 51, 53, 55, 57, 59, 61, 63, 65). Each count charged a payment of \$50 in connection with an appraisal of a different property. The time and place of each payment was further particularized in the bill of particulars and in the testimony of Goodwin at the trial. Harry Bernstein paid the money to Goodwin in Bernstein's office at Eastern Service Corpora-

* Appellants also contend that the court erred with respect to the matter of limiting instructions (Bernsteins' brief, p. 74). The court's instructions, when read as a whole, and its actions in this regard were proper and within its discretion. Since appellants have failed to point out how the instructions and actions of the court were erroneous, and it surely is not clear from a reading of the record that any error was committed in this regard, a more detailed response is not possible. However, the government will be prepared to answer any questions as to this matter at oral argument.

** In response to Point VIII(b) of Bernsteins' brief.

tion. On October 6, 1967 Bernstein paid Goodwin \$50 each for seven property appraisals, a total of \$350 (R. 12281) (five of the payments were charged in the indictment—counts 39, 41, 42, 44, 46). On October 20, 1967 Bernstein paid Goodwin \$50 each for six property appraisals, a total of \$300 (R. 12409, 12451) (two were charged in the indictment—counts 48, 50). On October 27, 1967 Bernstein paid Goodwin \$50 each for six property appraisals, a total of \$300 (R. 12516) (two were charged in the indictment—counts 51, 53). On December 14, 1967 Bernstein paid Goodwin \$50 each for five property appraisals, and \$300 for Christmas (R. 12661, 12686) (two were charged in the indictment—counts 57, 59).*

Appellants contend that the payments on a single date of \$50 each for various property appraisals constitute one crime, that they were convicted on 11 counts as a result of four payments, and thus that these bribery counts are multiplicitous.** A determination of this issue raises a

* On November 10, 1967 Bernstein paid Goodwin \$50 each for six property appraisals, a total of \$300 (R. 12546-547) (one was charged in the indictment—count 55). On February 15, 1968 Bernstein paid Goodwin \$50 each for four property appraisals (R. 12714) (one was charged in the indictment—count 61). On July 19, 1968 Bernstein paid Goodwin \$50 each for two property appraisals, one of the payments being made for Rose Bernstein (R. 12817-818) (both were charged in the indictment—counts 62, 63, but on count 62 the jury acquitted the only named defendant, Rose Bernstein). On June 18, 1970 Bernstein paid Goodwin \$50 each for two property appraisals (R. 13001-002) (one was charged in the indictment—count 65).

Since appellants were convicted on only one \$50 payment on each of these dates, the issue raised herein is not applicable to these counts.

** More specifically, appellants contend that these counts are "duplicitous" (Bernsteins' brief, p. 78). "'Duplicity' is the joining in a single count of two or more distinct and separate offenses. 'Multiplicity' is the charging of a single offense in several counts." Wright, *supra*, § 142, at p. 306. Since what appellants refer to is multiplicity, we take the liberty of substituting that word for appellants' word.

question as to what constitutes a separate offense, which in turn raises the question of legislative intent with respect to the particular statute involved, here 18 U.S.C. § 201.

While in one sense the payments on a single date of \$50 each for several property appraisals may be viewed as a single transaction, yet in another sense each payment for a particular property appraisal involved a separate act motivated by a separate impulse. On the question of legislative intent as to § 201, while not directly on point, the case law supports the government's position that if each \$50 payment constituted a separate act committed with the requisite criminal intent, each constituted a distinct and separate crime even though part of a single transaction. See *United States v. Michelson*, 165 F.2d 732, 733 (2d Cir. 1948), *aff'd*, 335 U.S. 469 (1948) (indicating the Court's belief that under § 201 Congress provided that the offering and giving of a bribe, when constituting separate acts committed with the requisite criminal intent, are two distinct crimes even when part of a single transaction). See also *United States v. Deutsch*, 475 F.2d 55, 56 (5th Cir. 1973); *United States v. Barnes*, 431 F.2d 878, 879 (9th Cir. 1970), *cert. denied*, 400 U.S. 1024 (1971). This leaves as the critical question whether or not separate acts or one act was committed.

An examination of the evidence indicates that separate acts were committed. From the date Goodwin made an appointment with Bernstein to appraise the particular property through the final date of action by Goodwin with respect to the particular property, each property appraisal was treated separately by Bernstein and Goodwin. Indeed, one of the essential elements of the crime is that the payment be made with specific intent to influence an *official act* of the FIA appraiser. Bernstein's conversations with Goodwin as to the official acts (initial appraisal, revaluation) were distinct and separate as to each count. The official acts by Goodwin were distinct and separate as to each count. The following schedule of Goodwin's official acts clearly illustrates this point:

<i>10/6/67 Payments</i>	<i>Date of Appraisal</i>	<i>Date of Revaluation</i>	<i>Transcript</i>
Count 39 (190 Adelphi St.)	10/5/67	1/11/68	12144-12170, 12281
Count 41 (185 Sackman St.)	10/2/67	none	12170-12193, 12281
Count 42 (356 Van Sieten Ave.)	10/5/67	11/9/67	12194, 12201-12214, 12281
Count 44 (312 Milford St.)	9/29/67	Feb. 68	12214, 12230-12243, 12281
Count 46 (340 Van Sieten Ave.)	10/6/67	none	12243-12244, 12253-12268, 12281
<i>10/20/67 Payments</i>			
Count 48 (616 Schenck Ave.)	10/20/67	1/24/68	12361-12385, 12409, 12449-12451
Count 50 (468 Miller Ave.)	10/19/67	11/7/67	12387-12403, 12409, 12449-12451, 12744
<i>10/27/67 Payments</i>			
Count 51 (381 Douglas St.)	10/27/67	none	12456-12458, 12478-12485, 12501-12509, 12516, 12526
Count 53 (726 Snediker Ave.)	10/26/67	none	12455-12477, 12509-12510, 12516, 12526
<i>12/14/67 Payments</i>			
Count 57 (452 Miller Ave.)	11/13/67	1/12/68	12625, 12638-12649, 12659-12661, 12686
Count 59 (454 Miller Ave.)	11/16/67	2/15/68	12625-12638, 12643, 12659-12661, 12686

The result of the corrupt influence was separate and distinct as to each count. Indeed, even on the date the money was paid to Goodwin, each property was treated separately. Goodwin and Bernstein would discuss each property separately, and as to those which Bernstein had a financial interest in, he would indicate that that was one on which Goodwin would then be paid \$50. It was only fortuitous and for convenience that, instead of handing Goodwin \$50 after they finished discussing each particular property, Bernstein waited until the end of the entire discussion and handed Goodwin a sum of money consisting of \$50 for each of the requisite properties. Surely in every meaningful aspect each count involved a separate act.

Appellants rely heavily on *Ladner v. United States*, 358 U.S. 169, 79 S. Ct. 209 (1958). In that case the Supreme Court held that a single discharge of a shotgun by a defendant which wounded two federal officers constituted a single violation of the statute prohibiting assault of a federal officer. However, the Court went on to note that (fn. 6):

In view of the trial judge's recollection that 'more than one shot was fired into the car in which the officers were riding . . .' we cannot say that it is impossible that petitioner was properly convicted of more than one offense, even under the principles which govern here.

Since proceedings at the trial had not been transcribed, the case was remanded for further proceedings.

Thereafter Ladner's co-defendant, Cameron, filed a motion to set aside the second sentence imposed on him. After an evidentiary hearing in the district court, the court found that more than one shot had been fired and that each of the two federal officers had been individually shot at. It concluded that two separate offenses had been committed and thus upheld the consecutive sentences on the two counts. This ruling was affirmed on appeal. *Cameron v. United States*, 320 F.2d 16 (5th Cir. 1963).

Thus the principle in this regard is that where there are distinct, successive acts, even though part of a single transaction and closely related in time, multiple crimes have been committed. See *United States v. Farries*, 459 F.2d 1057, 1064 (3d Cir.), cert. denied, 409 U.S. 888 (1972); *United States v. Williams*, 446 F.2d 1115 (5th Cir. 1971); *United States v. Lewis*, 435 F.2d 417, 420 (D.C. Cir. 1970). As the Supreme Court said in *Blockburger v. United States*, 284 U.S. 299, 302, 52 S. Ct. 180, 181 (1932):

Each of several successive sales constitutes a distinct offense, however closely they may follow each other. The distinction stated by Mr. Wharton is that, 'when the impulse is single, but one indictment lies, no matter how long the action may continue. If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie'.

In every meaningful respect herein there were separate, successive payments of \$50 with respect to each of the counts involved herein. Surely the official acts which constituted the evil consequences of the corruption in each count were separate and distinct.* This is a factor which

* The official acts included initial appraisals which were done prior to payment, and in some instances revaluations done after payment. As the jury was charged, whether the payment is made before or after the official act is not decisive. An intent to influence may be found where payment is made after the official act has been performed if there is an arrangement or understanding that payment would follow the official act. *United States v. Umans*, 368 F.2d 725, 730 (2d Cir. 1966), cert. dismissed, 389 U.S. 1025 (1967). This being so, surely it is appropriate in determining whether there is one payment or successive payments to consider whether there is an understanding or arrangement that as to each property Goodwin would receive a separate payment of \$50. Surely Goodwin and Bernstein considered that there were separate payments for each property.

should be considered in determining whether there was one or successive acts of bribery. For the purpose of the statute is "to protect the public from the evil consequences of corruption in the public service". *Kemler v. United States*, 133 F.2d 235, 238 (1st Cir. 1942). Or, as this Court put it in *United States v. Jacobs*, 431 F.2d 754, 759 (2d Cir.), *cert. denied*, 402 U.S. 950 (1970):

The evil sought to be prevented by the deterrent effect of 18 U.S.C. § 201(b) is the aftermath suffered by the public when an official is corrupted and thereby perfidiously fails to perform his public service and duty. Thus the purpose of the statute is to discourage one from seeking an advantage by attempting to influence a public official to depart from conduct deemed essential to the public interest. As Judge Hastie aptly stated in *United States v. Labovitz*, 251 F.2d 393, 394 (3 Cir. 1958): "It is a major concern of organized society that the community have the benefit of objective evaluation and unbiased judgment on the part of those who participate in the making of official decisions. Therefore, society deals sternly with bribery which would substitute the will of an interested person for the judgment of a public official as the controlling factor in official decision."

POINT XI

Appellant Behar was not unconstitutionally denied representation by counsel of her choice.*

Appellant Behar contends that she was unconstitutionally denied representation by counsel of her choice. Although a number of arguments are made in this regard, the chief ones are that the court wrongfully found that

* In response to Point I of Behar's brief.

an actual conflict of interest existed, erred in refusing to accept a waiver of any potential conflict of interest, and wrongfully ordered appellant's attorney to terminate his representation of her. Appellant states that the proceedings can only be fully appreciated by reading the entire transcript relevant thereto (C. 143-277). We agree. However, as will be shown below, any fair reading of the transcript does not support appellant's contentions herein. There was a conflict of interest; appellant did not make a clear, knowing and intelligent waiver of the conflict of interest; appellant's attorney voluntarily withdrew as counsel for Behar upon the finding of a conflict of interest; under all the circumstances the court's treatment of the matter was entirely reasonable.

(1)

At the time subpoenas were issued requiring the appearance of appellants Behar and the Bernsteins before the grand jury, Harry Bernstein told Behar that he would get her a lawyer. Bernstein's attorney referred Henry Boitel, Esq. to Behar. Mr. Boitel represented Behar at that time and in the proceedings herein immediately after the indictment was returned. With the knowledge and consent of Behar, Mr. Boitel's fee was being paid by the Bernsteins and Eastern Service Corporation. (A. 157, 164, 195-196, 215.) Since Behar was a codefendant with the Bernsteins and Eastern Service Corporation, there was a possibility that a conflict of interest existed. The question was brought before the district court, which held a hearing on July 24 and 25, 1973 (C. 143-277).

Appellant Behar testified on July 24 (C. 157-170) and again on July 25, 1973 (C. 215-225). There was much discussion between the court and counsel concerning a finding of a conflict of interest, withdrawal by Mr. Boitel, a waiver of any conflict of interest, and the ruling of the court (C. 170-177, C. 181-188, C. 226-264). However, in

the end the court found that there was a conflict of interest and that appellant Behar had not made a knowing and intelligent waiver of any conflict of interest; upon the finding of a conflict of interest, Mr. Boitel withdrew as attorney for appellant Behar (C. 254, 260-263). The court then asked appellant Behar to retain new counsel and, if she was unable to, to return in two days and request that counsel be appointed for her (C. 263-264). On July 27, 1973 Behar again appeared before the district court and stated that she could not afford to retain counsel herself. The court thereupon assigned Richard Rosenkranz, Esq. as her attorney (C. 270-277).

(2)

Representation free from conflicting interests is an important part of the Sixth Amendment right to the effective assistance of counsel in criminal cases. It is the duty of the trial court to protect the right of a defendant to the effective assistance of counsel. In the context of assigned counsel, the court can avoid serious problems by assigning separate, independent counsel when a serious question arises as to a conflict of interest. Where the defendant has retained his counsel, the court must also keep in mind the right, of constitutional dimensions, to representation by counsel of one's choice.* That choice should not be *unnecessarily* obstructed by the court. *United States v. Sheiner*, 410 F.2d 337, 342 (2d Cir. 1969), *cert. denied*, 396 U.S. 825 (1970). However, the exercise of that right must be subject to the necessities of sound judicial administration. *United States v. Dardi*, *supra*, 330 F.2d at 335.

The fact that a codefendant was paying Mr. Boitel's fee for representing Behar raised the possibility of a con-

* The context of the case at bar would appear to be somewhere in the middle of these two situations. Behar could not afford to retain her own counsel. The Bernsteins and Eastern Service Corporation retained counsel for her.

flict of interest in this case. The basis for the court's finding of a conflict of interest lies in the nature of the defense which the defendants would present. Without getting bogged down in semantics, if there were any conflicting or inconsistent defenses between Behar on the one hand, and the Bernsteins and Eastern Service Corporation on the other, which might possibly be raised at trial, then there was a potential conflict of interest. If there were any conflicting or inconsistent defenses which these defendants intended to raise at trial, or which by their very nature would most likely be raised, then an actual conflict of interest existed. At the outset of the proceedings the district court envisioned a conflict of interest between appellant Behar and those underwriting her defense based upon conflicting and inconsistent defenses as to corporate and individual liability.* Behar was an employee of Eastern Service Corporation. The court anticipated that Behar might take the stand and present a defense that she was just doing her job, obeying the orders of her superiors, following standard office procedure, and therefore they, not she, were guilty of any crimes. On the other hand, the Bernsteins and Eastern Service Corporation could assert the defense that Mrs. Behar had acted *ultra vires*, that after years of employment she knew exactly what she was doing in signing the credit applications containing the alleged false statements, and that she acted on her own (C. 149-150, 164-166, 172). Counsel did not deny that these conflicting and inconsistent defenses would be presented at trial. Indeed, these defen-

* At that time the government intended to introduce tape recordings of conversations between Goodwin and the Bernsteins indicating consciousness of guilt. The tapes would also reveal that at the time of the grand jury investigation the Bernsteins were paying the legal fees of Behar's attorney. Although the government indicated that it would not refer to the fact that the Bernsteins were continuing to pay legal fees for Behar, the risk existed that the jury would reach this conclusion from the tape itself (A. 154-155).

dants did assert these very defenses at trial through cross-examination and summation.* Surely there was a sufficient basis for the court's finding of a conflict of interest.

Appellant's contention that there was no conflict of interest, only a possibility of one, appears to be based upon a misconception of terms, and confuses the possibility of a conflict with the possibility of prejudice arising out of the conflict. Absent a denial that the conflicting defenses would be presented at trial, the conflict existed. The court was then confronted with the question as to whether any prejudice would occur at trial. The decision as to whether or not a defendant should take the stand could be unduly influenced or affected by the risk that her testimony may develop or disclose matters harmful to the defendants underwriting her defense or in conflict with their defense. The freedom of the attorney to cross-examine a defendant or witness might be inhibited by his representation of one defendant and financial ties to codefendants. The possibility existed of a failure to vigorously assert a defense which conflicted with the defense of the codefendants paying her attorney's fees.

* Although Mrs. Behar did not take the stand, she put forth the defense forseen by the district court. Through the cross-examination of Ortrud Kapraki (6059-60) and Frank Fey (11376-11390), Mr. Rosenkranz tried to establish that Mrs. Behar's position was subordinate to Fey and that her function was merely to supervise the girls in the processing section. Mr. Rosenkranz, through Fey (11376-11390), attempted to show that Mrs. Behar did not have the authority to hire and fire or to refuse to do business with Kapraki, that her position as assistant vice president was merely a title so she could function as an authorized signatory of documents which were being submitted to the FHA by her employer, Eastern Service Corporation, and that her role was only to see that the application contained all the required papers.

In summation, Behar's counsel made these arguments in her defense (R. 20039-20041, 20048, 20060-20062). In summation appellant Eastern Service Corporation argued that Behar acted on her own on account of the money Kapraki was paying her, without any intent to benefit the corporation (R. 19646-19647).

Appellant Behar implicitly recognizes these conflicting defenses in her brief (p. 11, fn. at p. 36).

Mr. Boitel assured the court that he would give Behar full and proper representation, and that he would not hesitate to point the accusatory finger at the codefendants underwriting her defense.* The court did not question the integrity of Mr. Boitel. However, once a conflict exists (whether it be termed actual or potential) and the possibility of prejudice arises, it is incumbent upon the district court to make a careful inquiry into the defendant's understanding of the situation, and determine whether or not the defendant knowingly and intelligently waives any conflict of interest, actual or potential. *United States v. Alberti*, 470 F.2d 878, 881 (2d Cir. 1972), *cert. denied*, 411 U.S. 919 (1973); *United States v. DeBerry*, 487 F.2d 448, 452-454 (2d Cir. 1973).

(3)

After questioning appellant on July 24, 1973 (C. 157-170), the district court was disposed to accept her waiver as to any conflict of interest (C. 182). No decision was made at that time, because Mr. Boitel indicated that he was disposed to withdraw from the case in light of the finding of a conflict of interest (C. 170, 173, 181-182, 185-188). On the next day, the court indicated that it did not believe appellant was fully cognizant of the meaning of conflict of interest and assistance of counsel (C. 204). Accordingly, the court again questioned appellant concerning these matters (C. 215-225). The court found that appellant did not have a full understanding of the matters involved, and that she was willing to waive her rights in large part because

* Appellant's reliance on *United States v. Wisniewski*, 478 F.2d 274, 285 (2d Cir. 1973) and *United States v. Paz-Sierra*, 367 F.2d 930, 932 (2d Cir. 1966), *cert. denied*, 386 U.S. 935 (1967), is misplaced. Those cases merely indicate that the court may and should rely on counsel to disclose any potential conflict of interest, not as to whether a conflict which exists will cause prejudice at trial. In those cases there were no conflicting defenses. In the case at bar Mr. Boitel did *not* deny that conflicting defenses would be presented; his assurances went only to the question of prejudice at trial.

she was in a financial bind and did not really comprehend the nature and importance of a waiver (C. 224-225, 238, 254).

A waiver of the right to the effective assistance of counsel in this regard is not lightly to be found. There must be a clear, knowing, intelligent and competent waiver by the defendant. *Glasser v. United States*, 315 U.S. 60, 70-71 (1941); *United States v. Sheiner*, *supra*, 410 F.2d at 342. The basis for the court's findings in this regard is in the following testimony of appellant on July 25, 1973.

Appellant recognized the conflict between herself and those underwriting her defense, and that the Bernsteins' and Eastern Service Corporation's interest in their defense was different than her interest in her own (C. 218-219). The district court asked Mrs. Behar whether, since their interests were different and since they were paying for her attorney, was "it not a fact that a question may arise for the lawyer which would effect you?" (C. 219). Appellant agreed that it was a fair statement, but said that she was willing to take a chance and sign a waiver (C. 219). The district court then proceeded to tell appellant that it was his duty to protect her rights even though she was willing to waive them. The court said that there could come a time when he would see "somebody being done in by a lawyer... because of [the attorney's] interest in the payment of a fee", that that was the fear he had for her, and that he could not sit back and let that injustice happen (C. 220). Again appellant said she was willing to sign a waiver (C. 221).*

* This was in part because a new attorney was an unknown factor to her (C. 221). However, after appellant got to know her trial attorney, and after the trial at the time of her sentencing, appellant indicated that she was satisfied with the services of her trial attorney (D. 46).

However, when the district court asked Mrs. Behar whether if just such an event as described above should occur during the course of trial, would she go so far as to say the trial court was to remain mute and do nothing at all to protect her, the following took place (C. 222-223) :

The Witness: *No sir.*

The Court: You don't say that.

The Witness: *Not at a later date* but I don't think it would happen.

The Court: That's what's bothering me. If you give me a waiver it is for all time.

The Witness: Yes, for all time.

The Court: But at a latter date, if I see someone done in—for instance, I think you are not being given the effective assistance—let's use that word—for some reason that might come to mind, do you want me to sit back and do nothing *or lean over and tell you 'You're in trouble lady?'*

The Witness: *Yes.*

The Court: *Of course you would want me to do it at that time.* [Emphasis supplied.]

It is apparent that while appellant desired to keep the counsel retained for her by her employer, Eastern Service Corporation, and the Bernsteins, she also did not want to lose any of her rights to effective representation. Therefore, the district court was fully justified in finding that there was not a clear, knowing and intelligent waiver by appellant of her right to the effective assistance of counsel in this regard.*

* Unlike an appellate court, a trial judge conducting a hearing into the question of a conflict of interest does not have the benefit of a trial record and hindsight. His determination of a conflict of interest is not based upon a showing on appeal of conflicting defenses at trial resulting in actual prejudice to a defendant. The trial judge can only presuppose that given a set of circumstances, certain defenses will be presented at trial and the possibility of

[Footnote continued on following page]

Appellant contends that the district court wrongfully ordered Mr. Boitel to terminate his representation of Mrs. Behar. This contention is erroneous both factually and legally.

In light of the conflict of interest and the failure by appellant to make a sufficient waiver, the court was fully prepared to order Mr. Boitel to terminate his representation of Mrs. Behar under the financial arrangements then existing. However, it was not necessary for the court to make this order (C. 226-264). Based on the court's finding of a conflict of interest, Mr. Boitel voluntarily withdrew as the attorney for Mrs. Behar (C. 260-264).

This withdrawal was conditioned on a finding of an *actual* conflict of interest by the court (C. 170-172, 185, 187, 262). Further, it was subject to a reapplication by Mr. Boitel if the Bar Association indicated that it did not see an actual conflict of interest * and that it was appro-

prejudice exists. Although a defendant may be willing prior to trial to waive her rights in this regard, unless it is clear and unequivocal an appellate court might well reverse a conviction on the basis that the defendant, at the time of the waiver, did not fully understand the import and consequences of her actions. Judge Travia well recognized this situation at these hearings (C. 187, 204).

* In her brief appellant distorts the significance of an *actual* conflict of interest and any ruling by the Bar Association thereon. These matters related only to the position of Mr. Boitel on the question of withdrawal, not to the duty of the court. If there was no finding of an *actual* conflict of interest, then Mr. Boitel would not have withdrawn. Moreover, the court left open to Mr. Boitel the possibility of revoking his withdrawal upon an appropriate ruling by the Bar Association. At all events, as will be shown *infra*, if there was a conflict of interest (whether actual or potential) and no effective waiver, it was the duty of the court to terminate Mr. Boitel's representation of Mrs. Behar under the existing financial arrangements.

priate for him to stay in the case (C. 260-262). Mr. Boitel apparently chose not to follow through on his suggestion, as there is no indication in the record that he ever obtained a ruling by the Bar Association. On the question of a finding of an *actual* conflict of interest, as previously noted the court envisioned conflicting defenses at trial, counsel did not deny that these conflicting defenses would be presented at trial, and in fact they were presented at trial. Under these circumstances the basis upon which Mr. Boitel indicated he was withdrawing (*actual* conflict of interest) did exist herein.

In any event, even if Mr. Boitel had not withdrawn, where there is a conflict of interest (whether actual or potential) and no sufficient waiver, then the court has the power and properly should terminate representation of a defendant under financial arrangements whereby her co-defendants are underwriting her defense. See *United States v. DeBerry*, *supra*, 487 F.2d at 452-454; *United States v. Sheiner*, *supra*, 410 F.2d at 342. This is especially true herein, where any problem which might later arise in this regard would have a serious effect on the sound judicial administration of this major case before the district court (C. 204-207). Under all the circumstances the district court's treatment of this conflict of interest matter was entirely reasonable.* *United States v. Dardi*, *supra*, 330 F.2d at 335.

(5)

Appellant Behar's remaining contentions in this regard (brief, pp. 17, 28-34) are frivolous and can be briefly disposed of. Appellant was free to retain any counsel of her choice. This included Mr. Boitel, although the court

* The district court invited and encouraged appellant to bring this matter before this Court prior to trial (C. 212-213, 226, 243, 245, 246). Appellant apparently chose not to do so.

properly indicated that it would raise a question in that regard unless Mr. Boitel returned the money he had already received from the Bernsteins for pre-trial services (C. 213-214, 230-233, 239, 255). This situation never presented itself, as appellant could not afford to retain any attorney (C. 270-275).^{*} Concerning the question of assigned counsel, Mr. Boitel agreed that a defendant does not have the right to choose the attorney to be appointed under the Criminal Justice Act (C. 209-210). Further, the assignment of Mr. Boitel would simply have raised again a conflict of interest problem, unless he returned the legal fees he had already received from the Bernsteins (C. 174, 214). Understandably, Mr. Boitel was not willing to return these fees, as a substantial amount of legal work had already been performed by him (C. 230-233). Moreover, the suggestion that on the day the court appointed counsel for appellant it was abusive in an effort to club her into entering a plea of guilty is without any merit and utterly devoid of any support in the record (C. 270-277). The court was simply trying to impress on appellant the seriousness of the situation and the importance, if at all possible, of retaining her own counsel.

Finally, appellant contends that the court's subsequent actions deprived her of the effective assistance of counsel. Appellant mentions in passing, but does not appear to claim that there was any conflict of interest in assigned counsel's representation of an FHA employee in another FHA case.^{**}

^{*} The suggestion of limiting the scope of the indictment (C. 207-211) was simply not a reasonable alternative or solution to the problem. Moreover, it would not have removed the problem presented by the retention of the legal fees already received from the Bernsteins.

^{**} As appellant notes in a footnote on p. 32 of her brief, her assigned counsel represented an FHA employee in a different FHA bribery case; that employee was indicted for receiving bribes from another mortgage company, a competitor of Eastern Service Corporation. This case was unrelated to the instant one, and presented no conflict of interest (C. 276).

However, appellant does claim prejudice from the fact that the court permitted assigned counsel to absent himself from the first four days (October 1-4, 1973) of the procedural matters which took place shortly prior to the trial, and permitted assigned counsel to "pinch hit" for other attorneys and vice versa during the course of the trial.

An examination of the record indicates that there was no prejudice in this regard. Concerning the absence on October 1-4 due to another trial which had not been completed, the court indicated to appellant that her attorney would not be precluded from making any motion with respect to these procedural matters when he appeared (R. 158, 239, 252). Daily copy of the proceedings was available. When Mr. Rosenkranz appeared in court on October 9, 1973, colloquy between counsel and the district court indicates that the district court had kept counsel informed of everything that had gone on to date (R. 285-286). The district court advised counsel that it would grant him the right to make any motions he wished. Counsel advised the district court that he had conferred with the other attorneys in the case, and that he felt it sufficient if he were deemed to have made the same motions as the others, with the same results (R. 285). Counsel appeared on October 9, 10, and 11 when procedural matters took place, and had ample time prior to the commencement of the selection of the jury on October 15, 1973 to make any relevant motions. These events demonstrate that the court was concerned with preserving appellant's rights, including the effective assistance of counsel.

As to "pinch hitting" of attorneys, appellant has not shown any prejudice by the fact that, due to extenuating circumstances, her counsel or counsel for another defendant had to absent himself for a short time from a minute number of court appearances over a nine-month trial. Daily copy was available to all counsel, and counsel had the opportunity to make any motion on behalf of his client in this

regard. Furthermore, the temporary substitutions were made with the consent of the defendants involved. Moreover, appellant neglects to point out that these instances all occurred at a point in the trial when nothing was taking place in any way material to the particular defendant involved in the "pinch hitting". In an attempt to show prejudice, appellant refers to pages 4951-5170 of the record, states that this was a day when legal argument took place with respect to the government's theory of liability against Behar on the false statement counts, and suggests that appellant's assigned counsel may not have been present on that day. A closer examination of the portion of the record referred to indicates that Mr. Rosenkranz was very much present on that day and actively participated on behalf of his client (R. 4984-4987, 5004, 5026, 5057-5059, 5064). Finally, in this regard, at the time of sentencing appellant indicated that she was satisfied with the services of her assigned counsel (D. 46).

POINT XII

The pretrial motion to disqualify the district judge was properly denied.*

(1)

The instant indictment was one of thirteen superseding indictments returned by a grand jury on May 22, 1972. The related indictments consisted of approximately 800 counts and involved approximately fifty defendants. Appellants Harry Bernstein, Rose Bernstein, and Eastern Service Corporation were named as defendants in each of these related indictments. Pursuant to the rules of the United States District Court for the Eastern District of New York, these indictments were assigned to United States District Judge Anthony J. Travia.

* In response to Point I of Bernsteins' brief.

The defendants made numerous pretrial motions relative to these indictments. The district court, after reviewing a massive amount of legal papers, made its rulings on these motions in September and October 1972 (A. 393-394).

The federal grand jury which had returned these indictments continued its investigation into allegations of fraud and bribery involving the Federal Housing Administration (FHA). As a result, several more indictments were returned, a number of which were also assigned to Judge Travia.

During the period of time prior to March 22, 1973 approximately eleven defendants involved in the FHA prosecutions entered pleas of guilty (A. 396). Before accepting the guilty pleas, Judge Travia properly conducted an inquiry pursuant to Rule 11, Federal Rules of Criminal Procedure, to determine whether there was a factual basis for the pleas, and whether they were made voluntarily with an understanding of the nature of the charges and the consequences of the pleas. The court personally questioned each defendant concerning his involvement in the criminal activity, and the extent of his culpability. Where the defendant was alleged to be a member of a conspiracy or was pleading to a conspiracy count, the court inquired into the nature and scope of the conspiracy, the extent of the defendant's involvement and participation in the conspiracy, as well as his relationship with his alleged co-conspirators. Of the eleven defendants who pled guilty, eight were named as co-defendants and co-conspirators of appellants Harry Bernstein, Rose Bernstein, and Eastern Service Corporation. Six of the defendants were sentenced by the district judge during this period of time. (Appendix A, Volume I.)

On March 22, 1973 appellants Harry Bernstein, Rose Bernstein, Eastern Service Corporation and Florence Behar

filed an affidavit pursuant to 28 U.S.C. § 144, seeking to disqualify the district judge on the basis of an alleged personal bias and prejudice against each of these defendants. As a basis for the motion for refusal, appellants cited excerpts from the transcripts of guilty pleas and sentencings before the district judge of nine of the aforementioned defendants involved in the FHA prosecutions (A. 333-347). On March 30, 1973, after hearing oral argument, the district court denied appellants' motion (A. 445). Its order finding that the affidavit was legally insufficient and denying the motion was entered on April 9, 1973 (A. 572). Appellants then applied for a writ of mandamus which was denied by this Court on April 27, 1973. Their application for rehearing en banc was denied on June 28, 1973 (D. 55, 56).

(2)

Appellants contend that the affidavit was legally sufficient, and that it was reversible error for the district court to have denied their motion for recusal under 28 U.S.C. § 144. That section provides as follows:

§ 144. Bias or prejudice of judge.

Whenever a party to any proceeding in a district court makes and files a timely and *sufficient affidavit* that the judge before whom the matter is pending has a *personal* bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit *shall state the facts and the reasons* for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith. (Emphasis supplied.)

The purpose of this section is to secure for all parties to a proceeding a fair and impartial tribunal, free of any personal bias or prejudice against or in favor of any one of the litigants. However, the filing of the affidavit does not automatically require the court to disqualify itself. While it is incumbent upon the trial judge to accept as true the facts stated in the affidavit even if he knows them to be false, the court must determine whether the facts as stated constitute legally sufficient grounds for recusal. There is as much an obligation upon the judge not to recuse himself when the affidavit is legally insufficient as there is for him to recuse himself when the affidavit is sufficient. To be sufficient the affidavit must allege facts which give fair support to the charge of bias and prejudice against the defendant, and must show that the alleged bias and prejudice stems from an extra-judicial source. *Wolfson v. Palmieri*, 396 F.2d 121, 124 (2d Cir. 1968); *Rosen v. Sugarman*, 357 F.2d 794, 797-798 (2d Cir. 1966).

At the outset of any discussion as to the sufficiency of the affidavit, it should be noted that this Court prior to trial denied a mandamus application raising the claim now made. Although appellants claim that this denial was not on the merits, the contrary is more likely the case. As this Court said in *Rosen v. Sugarman*, *supra*, 357 F.2d at 797, "we can think of few situations more appropriate for mandamus than a judge's clearly wrongful refusal to disqualify himself. . . . To be sure, writs in such cases should be issued sparingly and only when the facts alleged clearly call for relief, lest mandamus to review refusals of disqualification become a potent weapon for harassment and delay." See also *Wolfson v. Palmieri*, *supra* (denial on the merits of mandamus application seeking to have the district judge recused). In light of the apparent length that this trial would involve even at the time of the mandamus application, surely if the facts alleged in the affidavit herein did "clearly call for relief," it would have been granted at that time. In any event an examination of the affidavit will reveal that it is clearly insufficient.

In an attempt to show bias and prejudice, the affidavit referred to a handful of excerpts from transcripts of guilty pleas by and sentencings of various defendants in the FHA prosecutions. The remarks referred to by appellants should be read in context. In making the thorough inquiries by Rule 11, the court questioned and acquired information from appellants' co-defendants (eg. Goodwin, Kapraki, Cohen, Fey) as to the nature of the conspiracy and the role of the various conspirators, including the central figures (namely the Bernsteins and Eastern Service Corporation) (see the minutes of the guilty pleas, A. 70-90, 125-221). Other comments were made by the court in response to appeals for leniency at the time of sentencing (see, e.g., A. 229-230, 280, 321, 326-329). When the remarks complained of are read in context, as they should be, it is apparent that they were not intended to constitute findings that the Bernsteins and Eastern Service Corporation were guilty of the crimes herein; they do not rise to the level of exhibiting prejudice sufficient to require disqualification. See *Wolfson v. Palmieri*, *supra*, 396 F.2d at 125.

At all events the most critical insufficiency of the affidavit is its failure to establish that the alleged bias was a personal one—that is, that it stemmed from an extra-judicial source. Every comment pointed to in the affidavit was made during the course of a judicial proceeding. The affidavit then concluded with the following allegation (A. 346):

14. It is respectfully submitted that the above noted extracts establish that: (a) Judge Travia has personally determined that those connected with Eastern Service Corporation, particularly the above named defendants, are guilty of the crimes charged, and (b) based upon allegations not contained in any of the indictments, but derived from some speculation or information from outside the record, Judge Travia has formed the opinion that the crimes charged actually resulted in extraordinary monetary

[sic] loss to the United States, as well as substantial ruinous losses to individual homeowners. Additionally, aside from using the pleading process for the purpose of ascertaining [sic] the guilt of the individual defendant before him, Judge Travia adopted the stance of a prosecutor and sought to perpetuate the testimony of the pleading defendant against those defendants, particularly the above named, who have chosen to stand trial.

In commenting on the source of the alleged bias and prejudice, appellants' brief (p. 20) states: "*Obviously, and as the affidavit states*, the basis of Judge Travia's bias and prejudice against the defendants did not arise from the record or even from the proceedings before him in this case" (emphasis supplied).^{*} However, the only allegation of an extra-judicial source related to the alleged opinion as to monetary loss, not to any opinion of guilt or innocence as to these defendants on the merits. The allegation (opinion "derived from some speculation or information from outside the record") is vague and conclusory, and fails to give facts as to the time, place, and circumstances of either an extra-judicial source or an extra-judicial statement. See *Hodgson v. Liquor Salesmen's Union Local No. 2 of State of N.Y.*, 444 F.2d 1344, 1348-1349 (2d Cir. 1971). Moreover, in contrast to the alleged opinion concerning monetary loss, there is no statement whatsoever in the affidavit that the court's alleged determination that these defendants were guilty of the crimes charged stemmed from any extra-judicial source. As already noted, the comments pointed to in this regard were made during the course of judicial proceedings.

^{*} Surely the truth of this bald claim is not "obvious." Indeed, any fair reading of the record indicates that it is false. The massive files and charges in these indictments, together with the judicial proceedings, are "obviously" the sources of the court's information (A. 426-433). Even the press reports referred to by appellants were part of the judicial record, being attached to motion papers seeking dismissal of the indictments on the ground of prejudicial pre-trial publicity (A. 433).

In *United States v. Sclafani*, 487 F.2d 245 (2d Cir.), *cert. denied*, 414 U.S. 1023 (1973), a situation analogous to the case at bar, the district court, subsequent to a Rule 11 inquiry and the entry of a guilty plea, sentenced a co-defendant prior to defendants' trial. One of the defendants sought to disqualify the district judge on the basis of statements made at the sentencing of the co-defendant (while advising the co-defendant to move to a new community, the judge referred to the remaining defendants as "people who have poisoned your existence and placed you on the road of delinquency" (487 F.2d at 252)). This Court rejected the recusal claim as follows (487 F.2d at 255):*

Disqualification is warranted and appropriate only if the alleged bias and prejudice stems from an extra-judicial source and has resulted in the formulation of an opinion on the merits not based upon what the judge has learned by his participation in the proceedings before him—a situation totally absent here. *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966) (emphasis added).

(3)

In discussing the concept of the prejudice required to disqualify a judicial officer, this Court said in *In re J. P. Linahan*, 138 F.2d 650, 651-652 (2d Cir. 1943):

* In an attempt to buttress their recusal claim, appellants have distorted the record in their brief (pp. 16-19). It would be useful herein to respond to only one of these distortions. Appellants contend that government counsel below did not question the sufficiency of the affidavit and that the district court did not pass upon the sufficiency of the affidavit. This contention is simply false (see especially A. 409-411, 572, 415, 426, 441). Of course, if the court had in fact formed a personal bias and prejudice against defendants, then he should recuse himself even though a legally sufficient affidavit had not been presented. See *Wolfson v. Palmieri*, *supra*, 396 F.2d at 125. Accordingly the court also passed on the truth of the allegations and found that no personal bias or prejudice in fact existed (A. 442, 572).

Democracy must, indeed, fail unless our courts try cases fairly, and there can be no fair trial before a judge lacking in impartiality and disinterestedness. If, however, "bias" and "partiality" be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions; and the process of education, formal and informal, creates attitudes in all men which affect them in judging situations, attitudes which precede reasoning in particular instances and which, therefore, by definition, are pre-judices. Without acquired "slants," pre-conceptions, life could not go on. Every habit constitutes a pre-judgment; were those pre-judgments which we call habits absent in any person, were he obliged to treat every event as an unprecedented crisis presenting a wholly new problem he would go mad. Interests, points of view, preferences, are the essence of living. Only death yields complete dispassionateness, for such dispassionateness signifies utter indifference. . . . An "open-mind," in the sense of a mind containing no preconceptions whatever, would be a mind incapable of learning anything, would be that of an utterly emotionless human being, corresponding roughly to the psychiatrist's description of the feeble-minded.

No judge who sat through proceedings by way of guilty pleas of co-defendants and co-conspirators, no judge who conducted himself properly in the preparation for trial in overseeing such matters as motions for discovery, bills of particulars, and suppression of evidence could be expected not to know at least some of the facts of the matter before him. If the proceedings cited by appellants as a basis for recusal were a ground to disqualify a judge for personal bias and prejudice, then no judge could ever preside over a criminal case from start to finish, especially in prosecutions

of the magnitude involved herein. The statute requires a showing that the bias and prejudice be personal. The law does not require that the trial judge be as ignorant of the facts of the case as the jury before whom the trial commences.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

May 19, 1975

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GALE A. DREXLER, ESQ.,
On the Brief.

ADDENDUM



Schedule A

<i>Count</i>	<i>Defendants*</i>	<i>Charge</i>	<i>Verdict**</i>
1	Harry Bernstein	§ 371	G
	Rose Bernstein		G
	Eastern Service Corp.		G
	Behar		G
	Cardona		G
	Dun & Bradstreet		M
	Prescott		M
	Cronin		M
	Jankowitz		NG
2	Harry Bernstein	§§ 1010 and 2	D
	Rose Bernstein		D
	Eastern Service Corp.		G
	Behar		G
	Cardona		G
3	Dun & Bradstreet	§§ 1010 and 2	M
	Prescott		M
4	Eastern Service Corp.	§§ 1010 and 2	G
	Behar		G
	Cardona		G
5	Eastern Service Corp.	§§ 1010 and 2	G
	Behar		G
	Cardona		G

* The defendants listed in each count are those who were charged as defendants in the particular count at the commencement of the trial. Where a defendant was named in the count but severed prior to the picking of the jury, he is not listed in the count in this schedule.

** The meaning of the symbols is as follows: G—guilty, NG—not guilty, M—jury disagreement, D—dismissed by the court on consent.

Schedule A

<i>Count</i>	<i>Defendants</i>	<i>Charge</i>	<i>Verdict</i>
6	Dun & Bradstreet Prescott	§§ 1010 and 2	M
			M
7	Eastern Service Corp. Behar Cardona	§§ 1010 and 2	G
			G
			G
8	Dun & Bradstreet Prescott	§§ 1010 and 2	M
			M
9	Eastern Service Corp. Behar	§§ 1010 and 2	G
			G
10	Eastern Service Corp. Behar Cardona	§§ 1010 and 2	G
			G
			G
11	Dun & Bradstreet Prescott	§§ 1010 and 2	D
			D
12	Eastern Service Corp. Behar Cardona	§§ 1010 and 2	G
			G
			G
13	Dun & Bradstreet Prescott	§§ 1010 and 2	M
			M
14	Eastern Service Corp. Behar Cardona	§§ 1010 and 2	G
			G
			G
15	Dun & Bradstreet Prescott	§§ 1010 and 2	M
			M
16	Eastern Service Corp. Behar Cardona	§§ 1010 and 2	G
			G
			G
17	Eastern Service Corp. Behar Cardona	§§ 1010 and 2	G
			G
			G

Schedule A

<i>Count</i>	<i>Defendants</i>	<i>Charge</i>	<i>Verdict</i>
18	Harry Bernstein	§§ 1010 and 2	D
	Rose Bernstein		D
	Eastern Service Corp.		G
	Behar		G
	Cardona		G
19	Dun & Bradstreet	§§ 1010 and 2	M
	Prescott		M
20	Harry Bernstein	§§ 1010 and 2	D
	Rose Bernstein		D
	Eastern Service Corp.		G
	Behar		G
	Cardona		G
21	Eastern Service Corp.	§§ 1010 and 2	G
	Behar		G
	Cardona		G
22	Dun & Bradstreet	§§ 1010 and 2	M
	Prescott		M
23	Eastern Service Corp.	§§ 1010 and 2	G
	Behar		G
	Cardona		G
24	Dun & Bradstreet	§§ 1010 and 2	M
	Prescott		M
25	Harry Bernstein	§§ 1010 and 2	G
	Rose Bernstein		D
	Eastern Service Corp.		G
	Behar		G
	Cardona		G
26	Dun & Bradstreet	§§ 1010 and 2	M
	Prescott		M

Schedule A

<i>Count</i>	<i>Defendants</i>	<i>Charge</i>	<i>Verdict</i>
27	Eastern Service Corp.	§§ 1010 and 2	G
	Behar		G
	Cardona		G
28	Eastern Service Corp.	§§ 1010 and 2	G
	Behar		G
	Cardona		G
29	Harry Bernstein	§§ 201 (b) (1) and 2	NG
	Rose Bernstein		NG
	Eastern Service Corp.		NG
30	Jankowitz	§ 201 (c) (1)	NG
31	Eastern Service Corp.	§§ 1010 and 2	G
	Behar		G
	Cardona		G
32	Dun & Bradstreet	§§ 1010 and 2	M
	Prescott		M
33	Harry Bernstein	§§ 201 (b) (1) and 2	NG
	Rose Bernstein		NG
	Eastern Service Corp.		NG
	Behar		NG
34	Jankowitz	§ 201 (c)	NG
35	Harry Bernstein	§§ 201 (b) (1) and 2	G
	Rose Bernstein		G
	Eastern Service Corp.		G
	Behar		G
36	Rose Bernstein	§§ 201 (b) (1) and 2	G
	Eastern Service Corp.		G

Schedule A

<i>Count</i>	<i>Defendants</i>	<i>Charge</i>	<i>Verdict</i>
37	Rose Bernstein	§§ 201 (b) (1) and 2	G
	Eastern Service Corp.		G
	Behar		G
38	Harry Bernstein	§§ 201 (b) (1) and 2	G
	Rose Bernstein		G
	Eastern Service Corp.		G
	Behar		G
39	Harry Bernstein	§ 201 (b) (1)	G
	Eastern Service Corp.		G
40	Cronin	§ 1010	M
41	Harry Bernstein	§ 201 (b) (1)	G
	Eastern Service Corp.		G
42	Harry Bernstein	§ 201 (b) (1)	G
	Eastern Service Corp.		G
43	Cronin	§ 1010	M
44	Harry Bernstein	§ 201 (b) (1)	G
	Eastern Service Corp.		G
45	Cronin	§ 1010	M
46	Harry Bernstein	§ 201 (b) (1)	G
	Eastern Service Corp.		G
47	Cronin	§ 1010	M
48	Harry Bernstein	§ 201 (b) (1)	G
	Eastern Service Corp.		G
49	Cronin	§ 1010	M
50	Harry Bernstein	§ 201 (b) (1)	G
	Rose Bernstein		D
	Eastern Service Corp.		G

Schedule A

<i>Count</i>	<i>Defendants</i>	<i>Charge</i>	<i>Verdict</i>
51	Harry Bernstein Eastern Service Corp.	§ 201 (b) (1)	G G
52	Cronin	§ 1010	M
53	Harry Bernstein Eastern Service Corp.	§ 201 (b) (1)	G G
54	Cronin	§ 1010	M
55	Harry Bernstein Eastern Service Corp.	§ 201 (b) (1)	G G
56	Cronin	§ 1010	M
57	Harry Bernstein Eastern Service Corp.	§ 201 (b) (1)	G G
58	Cronin	§ 1010	M
59	Harry Bernstein Eastern Service Corp.	§ 201 (b) (1)	G G
60	Cronin	§ 1010	M
61	Harry Bernstein Eastern Service Corp.	§ 201 (b) (1)	NG NG
62	Rose Bernstein	§ 201 (b) (1)	NG
63	Harry Bernstein Eastern Service Corp.	§ 201 (b) (1)	G G
64	Cronin	§ 1010	M
65	Harry Bernstein Eastern Service Corp.	§ 201 (b) (1)	G G

Schedule B**I. Appellant Harry Bernstein:**

<i>Count</i>	<i>Charge</i>	<i>Verdict</i>	<i>Sentence*</i>
1	§371	G	5 years and \$10,000
2	§§1010 and 2	D	—
18	§§1010 and 2	D	—
20	§§1010 and 2	D	—
25	§§1010 and 2	G	2 years and \$5,000
29	§§201(b) (1) and 2	NG	—
33	§§201(b) (1) and 2	NG	—
35	§§201(b) (1) and 2	G	5 years and \$10,000
38	§§201(b) (1) and 2	G	5 years and \$10,000
39	§201(b) (1)	G	5 years and \$10,000
41	§201(b) (1)	G	5 years and \$10,000
42	§201(b) (1)	G	5 years and \$10,000
44	§201(b) (1)	G	5 years and \$10,000
46	§201(b) (1)	G	5 years and \$10,000
48	§201(b) (1)	G	5 years and \$10,000
50	§201(b) (1)	G	5 years and \$10,000
51	§201(b) (1)	G	5 years and \$10,000
53	§201(b) (1)	G	5 years and \$10,000
55	§201(b) (1)	G	5 years and \$10,000
57	§201(b) (1)	G	5 years and \$10,000
59	§201(b) (1)	G	5 years and \$10,000
61	§201(b) (1)	NG	—
63	§201(b) (1)	G	5 years and \$10,000
65	§201(b) (1)	G	5 years and \$10,000

* As to each appellant the terms of imprisonment on the various counts were to run concurrently, the fines on each count to run consecutively.

Schedule B

II. Appellant Rose Bernstein:

<i>Count</i>	<i>Charge</i>	<i>Verdict</i>	<i>Sentence</i>
1	§371	G	4 years and \$10,000
2	§§1010 and 2	D	—
18	§§1010 and 2	D	—
20	§§1010 and 2	D	—
25	§§1010 and 2	D	—
29	§§201(b)(1) and 2	NG	—
33	§§201(b)(1) and 2	NG	—
35	§§201(b)(1) and 2	G	4 years and \$10,000
36	§§201(b)(1) and 2	G	4 years and \$10,000
37	§§201(b)(1) and 2	G	4 years and \$10,000
38	§§201(b)(1) and 2	G	4 years and \$10,000
50	§201(b)(1)	D	—
62	§201(b)(1)	NG	—

III. Appellant Eastern Service Corporation:

<i>Count</i>	<i>Charge</i>	<i>Verdict</i>	<i>Sentence</i>
1	§371	G	\$10,000
2	§1010	G	\$ 5,000
4	§1010	G	\$ 5,000
5	§1010	G	\$ 5,000
7	§1010	G	\$ 5,000
9	§1010	G	\$ 5,000
10	§1010	G	\$ 5,000
12	§1010	G	\$ 5,000
14	§1010	G	\$ 5,000
16	§1010	G	\$ 5,000
17	§1010	G	\$ 5,000
18	§1010	G	\$ 5,000
20	§1010	G	\$ 5,000

Schedule B

<i>Count</i>	<i>Charge</i>	<i>Verdict</i>	<i>Sentence</i>
21	§1010	G	\$ 5,000
23	§1010	G	\$ 5,000
25	§1010	G	\$ 5,000
27	§1010	G	\$ 5,000
28	§1010	G	\$ 5,000
29	§§201(b) (1) and 2	NG	—
31	§1010	G	\$ 5,000
33	§§201(b) (1) and 2	NG	—
35	§§201(b) (1) and 2	G	\$20,000
36	§§201(b) (1) and 2	G	\$20,000
37	§§201(b) (1) and 2	G	\$20,000
38	§§201(b) (1) and 2	G	\$20,000
39	§201(b) (1)	G	\$20,000
41	§201(b) (1)	G	\$20,000
42	§201(b) (1)	G	\$20,000
44	§201(b) (1)	G	\$20,000
46	§201(b) (1)	G	\$20,000
48	§201(b) (1)	G	\$20,000
50	§201(b) (1)	G	\$20,000
51	§201(b) (1)	G	\$20,000
53	§201(b) (1)	G	\$20,000
55	§201(b) (1)	G	\$20,000
57	§201(b) (1)	G	\$20,000
59	§201(b) (1)	G	\$20,000
61	§201(b) (1)	NG	—
63	§201(b) (1)	G	\$20,000
65	§201(b) (1)	G	\$20,000

Schedule B

IV. Appellant Florence Behar:

<i>Count</i>	<i>Charge</i>	<i>Verdict</i>	<i>Sentence</i>
1	§371	G	2 years
2	§1010	G	2 years and \$1,000
4	§1010	G	2 years and \$1,000
5	§1010	G	2 years and \$1,000
7	§1010	G	2 years and \$1,000
9	§1010	G	2 years and \$1,000
10	§1010	G	2 years and \$1,000
12	§1010	G	2 years and \$1,000
14	§1010	G	2 years and \$1,000
16	§1010	G	2 years and \$1,000
17	§1010	G	2 years and \$1,000
18	§1010	G	2 years and \$1,000
20	§1010	G	2 years and \$1,000
21	§1010	G	2 years and \$1,000
23	§1010	G	2 years and \$1,000
25	§1010	G	2 years and \$1,000
27	§1010	G	2 years and \$1,000
28	§1010	G	2 years and \$1,000
31	§1010	G	2 years and \$1,000
33	§§201(b) (1) and 2	NG	—
35	§§201(b) (1) and 2	G	2 years and \$1,000
37	§§201(b) (1) and 2	G	2 years and \$1,000
38	§§201(b) (1) and 2	G	2 years and \$1,000

Schedule B

V. Appellant Melvin Cardona:

<i>Count</i>	<i>Charge</i>	<i>Verdict</i>	<i>Sentence</i>
1	§371	G	2 years
2	§§1010 and 2	G	2 years and \$1,000
4	§§1010 and 2	G	2 years and \$1,000
5	§§1010 and 2	G	2 years and \$1,000
7	§§1010 and 2	G	2 years and \$1,000
10	§§1010 and 2	G	2 years and \$1,000
12	§§1010 and 2	G	2 years and \$1,000
14	§§1010 and 2	G	2 years and \$1,000
16	§§1010 and 2	G	2 years and \$1,000
17	§§1010 and 2	G	2 years and \$1,000
18	§§1010 and 2	G	2 years and \$1,000
20	§§1010 and 2	G	2 years and \$1,000
21	§§1010 and 2	G	2 years and \$1,000
23	§§1010 and 2	G	2 years and \$1,000
25	§§1010 and 2	G	2 years and \$1,000
27	§§1010 and 2	G	2 years and \$1,000
28	§§1010 and 2	G	2 years and \$1,000
31	§§1010 and 2	G	2 years and \$1,000

Schedule C

Trial Record:

<i>Events of Trial</i>	<i>Date</i>	<i>Transcript *</i>
Preliminary Procedures	10/1/73	R.1
	10/2/73	
	10/3/73	
	10/4/73	
	10/9/73	
	10/10/73	
	10/11/73	
Jury Selection	10/15/73	R.565
	10/16/73	
	10/17/73	
	10/18/73	
	10/23/73	
	10/24/73	
Opening Statements	10/25/73	R.2005
Government's Case:		
George Hipps (FHA)	10/29/73	R.2206
Vaughn Sanders (FHA)	10/29/73	R.2337
	10/30/73	
	10/31/73	
	11/1/73	
	11/5/73	
Ortrud Kapraki: (co-defendant—real estate speculator-bribery and false statements)	11/5/73	R.3014
	11/7/73	
	11/8/73	
	11/12/73	

* Transcript references are to the pages of the record at which the trial event commenced.

Schedule C

<i>Events of Trial</i>	<i>Date</i>	<i>Transcript</i>
	11/13/73	
	11/14/73	
	11/15/73	
	11/19/73	
	11/20/73	
	11/21/73	
	11/26/73	
	11/27/73	
	11/28/73	
	11/29/73	
	12/3/73	
	12/4/73	
	12/5/73	
	12/6/73	
	12/10/73	
Igmedio Valerio (mortgagor)	12/10/73	R.6447
	12/11/73	
Josue Noguerras (mortgagor)	12/11/73	R.6673
	12/12/73	
Eugenia Rivera (mortgagor)	12/12/73	R.6829
Sara Matos (mortgagor)	12/12/73	R.6885
Delfin Feliciano (mortgagor)	12/13/73	R.6974
Nilda Rosa Ortiz (mortgagor)	12/13/73	R.7148
	12/18/73	
Shirley Holmes (mortgagor)	12/18/73	R.7312
Sheltry Holmes (mortgagor)	12/19/73	R.7461
	12/19/73	

Schedule C

<i>Events of Trial</i>	<i>Date</i>	<i>Transcript</i>
Jose Abad (accountant—fictitious financial statements)	12/19/73	R.7517
	12/20/73	
Josephine Santiago (D&B reporter)	1/2/74	R.7750
	1/3/74	
	1/7/74	
	1/8/74	
	1/9/74	
Genevieve Winzinger (D&B reporter)	1/10/74	R.8796
	1/14/74	
	1/15/74	
	1/16/74	
	1/17/74	
Mary Aery (D&B reporter)	1/17/74	R.9547
	1/21/74	
	1/22/74	
David Miller (D&B reporting supervisor)	1/23/74	R.9987
	1/24/74	
	1/28/74	
Frank Fey (co-defendant—Vice President of Eastern Service Corp.—false statements)	1/29/74	R.10577
	1/30/74	
	1/31/74	
	2/4/74	
	2/5/74	
	2/6/74	
George McKrann (bank records re Behar)	2/6/74	R.11615
Edward Goodwin (co-defendant—FHA appraiser—bribery)	2/6/74	R.11660
	2/7/74	

Schedule C

<i>Events of Trial</i>	<i>Date</i>	<i>Transcript</i>
	2/13/74	
	2/14/74	
	2/19/74	
	2/20/74	
	2/21/74	
	2/25/74	
	2/26/74	
	2/27/74	
	2/28/74	
	3/4/74	
	3/5/74	
	3/6/74	
	3/7/74	
	3/11/74	
Rita Azzarello (Harry Bernstein's secretary)	3/12/74	R.14138
Rose Cohen (co-defendant—FHA	3/12/74	R.14233
assignment clerk—bribery)	3/13/74	
Martin Hardiman (FHA—chart re CUP)	3/13/74	R.14480
	3/14/74	
Milton Francis (FHA—CUP)	3/14/74	
	3/18/74	
	3/19/74	
	3/20/74	
Stipulation (re assignments of	3/21/74	R.15441
second mortgages)		
Government Rests	3/21/74	R.15454
Defense Motions	3/25/74	R.15464
	3/26/74	

Schedule C

<i>Events of Trial</i>	<i>Date</i>	<i>Transcript</i>
Procedures re Harry Bernstein's	3/27/74	R.15836
Physical Condition	3/28/74	
	4/1/74	
	4/2/74	
	4/3/74	
	4/4/74	
	4/9/74	
	4/11/74	
Defense—Harry Bernstein:		
Mordecai Waxman (Rabbi)	4/15/74	R.16075
Stipulation (notes of prosecution)	4/15/74	R.16087, 16157
Timothy Fiori (records of telephone co.)	4/16/74	R.16158
John Walsh (records of traffic dept.)	4/16/74	R.16170
Defense—Eastern Service Corp.—		
Roger Fred (Controller—ESC)	4/16/74	R.16177
	4/17/74	
Defense—Harry Bernstein—Con't:		
Maxwell Lehman (locksmith)	4/18/74	R.16370
Harry Bernstein Rests	4/18/74	R.16387
Defense—Eastern Service Corp.—Con't:		
Roger Fred—Con't.	4/18/74	R.16390
	4/22/74	
Defense—Rose Bernstein Rests	4/22/74	R.16710
Defense—Dun & Bradstreet:		
Harold Redding (D&B Vice Pres.—	4/23/74	R.16744
reporting policy)	4/24/74	
	4/25/74	

Schedule C

<i>Events of Trial</i>	<i>Date</i>	<i>Transcript</i>
Hamilton Mitchell (D&B—Pres.)	4/29/74	R.17211
James McDowell (Manager—D&B computer operations)	4/29/74	R.17274
John Swaysland (D&B—re computer)	4/29/74	R.17351
Donald Dean (D&B—re computer)	4/30/74	R.17365
	5/1/74	
Charles Nolet (D&B—accounting)	5/1/74	R.17679
	5/2/74	
Leslie Sparrow (Manager—Cameo Color Labs)	5/2/74	R.17789
Dun & Bradstreet Rests	5/2/74	R.17813
Defense—Prescott Rests	5/2/74	R.17813
Defense—Cronin:		
Herbert Cronin (defendant)	5/6/74	R.17841
	5/7/74	
	5/8/74	
	5/9/74	
	5/13/74	
Cronin Rests	5/13/74	R.18535
Defense—Behar:		
Joseph Monserrat (character witness)	5/14/74	R.18544
Mrs. Joseph Monserrat (character witness)	5/14/74	R.18550
Edith Jacobs (character witness)	5/14/74	R.18552
Isadore Sisko (character witness)	5/14/74	R.18554
Behar Rests	5/14/74	R.18556
Defense—Cardona:		
Roy Wing (records—Willoughby Peerless)	5/14/74	R.18557

Schedule C

<i>Events of Trial</i>	<i>Date</i>	<i>Transcript</i>
Cecilia Cardona (wife of defendant)	5/14/74	R.18562
William Zaffuto (character witness)	5/14/74	R.18631
Stipulation (re Jose Abad)	5/15/74	R.18675
Cardona Rests	5/15/74	R.18675
Defense—Jankowitz Rests	5/15/74	R.18678
Defense—Eastern Service Corp.—Con't:		
Stipulation (re Roger Fred)	5/15/74	R.18679
Eastern Service Corp. Rests	5/15/74	R.18707
All Defendants Rest	5/15/74	R.18707
Rebuttal:		
Stipulation (re Roger Fred)	5/15/74	R.18708
Stipulation (re D&B—computer)	5/15/74	R.18717
Government Rests	5/15/74	R.18720
Defense Motions	5/15/74	R.18737
Requests to Charge	5/16/74	R.18835
	5/17/74	
Summations	5/20/74	R.19220
	5/21/74	
	5/22/74	
	5/23/74	
	5/28/74	
	5/29/74	
	5/30/74	
	6/4/74	
	6/5/74	
	6/6/74	
	6/10/74	
	6/11/74	
	6/12/74	

Schedule C

<i>Events of Trial</i>	<i>Date</i>	<i>Transcript</i>
Court's Charge	6/13/74	R.21175
	6/14/74	
	6/17/74	
Jury Deliberations	6/17/74	R.21622
	6/18/74	
	6/19/74	
	6/20/74	
	6/21/74	
	6/24/74	
(verdict re appellants)	6/25/74	(R.21879)
	6/26/74	
	6/27/74	
	6/28/74	
	7/1/74	
	7/2/74	
	7/3/74	
	7/5/74	

Schedule D

Correlation Between Counts as Numbered in
Redacted and Original Indictment (72 CR 587)

<i>Redacted — Original</i>		<i>Redacted — Original</i>		<i>Redacted — Original</i>	
1	1	23	18	45	128
2	36	24	19	46	129
3	37	25	20	47	131
4	28	26	21	48	134
5	12	27	14	49	136
6	13	28	24	50	146
7	40	29	97	51	153
8	41	30	98	52	155
9	59	31	32	53	156
10	10	32	33	54	158
11	11	33	34	55	169
12	2	34	35	56	171
13	3	35	60	57	172
14	4	36	107	58	174
15	5	37	101	59	178
16	89	38	72	60	180
17	55	39	115	61	196
18	46	40	117	62	198
19	47	41	118	63	200
20	6	42	121	64	202
21	26	43	123	65	207
22	27	44	126		

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STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK

AFFIDAVIT OF MAILING

ss

LYDIA FERNANDEZ

being duly sworn,

deponent says and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

at on the 22nd day of May 19 75 he served two copies of the within

Brief for the Appellee

placing the same in a properly postpaid franked envelope addressed to:

Frank Raichle, Esq., 10 Lafayette Square, Buffalo, N. Y. 14203;

Harry J. Boitel, Esq., 233 Broadway, New York, N. Y. 10007; and

John A. Kiser, Esq., 36 West 44th Street, New York, N. Y. 10036

deponent further says that he sealed the said envelope and placed the same in the mail chute for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

to before me this

2nd day of May 19 75

Olga S. Morgan
OLGA S. MORGAN
Notary Public, State of New York
No. 24-121955
Qualified in Kings County
Commission Expires March 30, 1977